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Volume II

The Ownership and Use of Land (*Continued*)

including

Leases, Joint Ownership and Joint Use, Rights Acquired by License and Mortgage; Rights of Public and Private Way; Light, Water, and Farm Law

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1. LEASES of land are multiplying in number, though happily not in complexity. The modern law has been clarified by statute; nevertheless there are many ancient principles remaining, which it is especially desirable to understand because these diverge so far from the common understanding on which individuals who do not know the law too often rely. Perhaps no subject will be considered of more practical importance to a larger number than this concerning leases and the mode of using leased property.

First of all, it may be remarked that an oral, or to use a legal phrase, a "parol lease," is a very one-sided agreement in favour of the landlord. Is proof wanted? Should a man rent a building for a year which burned down within a week after taking possession without any fault of his, nevertheless he would be required to pay the rent to the end of his tenancy, nor would the landlord be required to rebuild, but might serenely keep still and compel his tenant to pay rent, as if he were in undisturbed occupancy. In some states this common law rule has been changed by statute.[1] Consequently, it behooves every one who rents a building, however short the time, to make a written lease embodying the entire agreement.

2. As a lease is an agreement for the use of land, a statute requires that it shall be in writing, unless the period is very short—in many states one year. In some of them, however, the period is longer—three years, thus corresponding with the English statute. The statute prescribing this requirement is one of the most important in the entire body of the law, and is known

[1] See § 27.

as "the statute of frauds," first enacted in England, and afterwards re-enacted in whole, or in part, in nearly every state of the Union. A valid lease for a year may be made verbally, even though the time for taking possession is not immediate. Furthermore, if it exceed the statutory period, it is not absolutely void, but operates as a lease at will.[1]

3. The person who leases is called the lessor; the one who is to come into possession, the lessee. The latter does not own the land, but has only a limited right to the use of it. The extent of this use or occupancy, like so many other questions in the law, cannot always be easily ascertained. In a general way, it may be said that the lessee is the possessor, and can make such use of the land or premises during his term as the lease or the law prescribes. For example, on one occasion a person hired a store, on the outer wall of which people posted advertisements, paying for the privilege. The question at once arose, could the lessee sell this privilege, or did the landlord still have the right? How fully the lessee can use the premises will be considered elsewhere.[2]

4. A lease is for a definite period, usually called a term. A lease from the first day of July begins on the second day and lasts through the anniversary of the day from which it was granted. Very often the term of the lease is expressed definitely—leaving no question open concerning the precise number of days for which it is to run.

[1] See Section 41 of this chapter for the description of such a lease.
[2] See § 14.

A lease may be made for a time that can be definitely ascertained. Thus, a lease to A for twenty-one years, should he live so long, would be valid. So would a lease to A during his minority, as the time of attaining his majority is fixed by law. In like manner a lease for a year, with the privilege of holding for three years from a certain day, means the right to remain from year to year, not exceeding three years; and the tenant may quit at the end of any year on giving proper notice. Again, a lease for a year, and so on from year to year, is regarded as a lease for one year only. If the tenant continues for a second year without the lessor's dissent, it is a lease for that year, and so on for each subsequent year.

A lease may be created to take effect at a future date, provided the period of beginning is not so far away as to violate the law concerning the creation of future estates. In our modern American jurisprudence this question is rare; under the English system, whence this rule is derived, the legality of leases that are to begin in the future has caused much legal controversy.

In Massachusetts a term for one hundred years or more is deemed a fee or absolute estate, so long as fifty years remain unexpired. In Ohio lands perpetually leased (or renewable forever), though in one sense they are leased, in another sense, are absolute property, and may be taken for the debts of the lessee. In Connecticut lands that were free from taxation because they were devoted to religious uses were leased for the period of ninety-nine years to escape taxation; and the purchaser, supposing this method of evasion would be successful,

paid a much higher price for them. The state pounced on the new owner, declared that the lease was simply an evasion to escape taxation, and that for taxation, at least, the land must be regarded as an absolute estate. Through a costly lawsuit, therefore, did the buyer purchase his wisdom, like many others before and since his day.

5. In creating a lease any language will suffice showing the intention of the parties. The words generally used to indicate this are: "grant," "demise," and "to farm let." They have a technical and extended meaning, and imply that the term of a lease is to begin presently, and not at a future date, or on a contingency. Neither of them is indispensable to constitute a valid lease. A lease should describe clearly the premises that are to be leased, for a defective description cannot be cured by outside or additional evidence.

6. Sometimes a lease is made, or at other times an agreement for a lease, and the parties themselves have not always known which thing they intended to do. To the reader this question may seem to be very near the edge of the absurd, but as the language used in a lease, or in an agreement for a future lease, is often nearly the same, the difficulty, in truth, does arise. It can hardly appear in agreements that are to go into immediate operation, but only in those that are to be operative at a future time. The question is important because, if the agreement is a lease, then it cannot be varied or contradicted by other evidence, any more than any other completed contract or agreement. On the other hand, if the agreement be simply *for* a

lease, then, from its very nature, it is incomplete and is open for revision.[1]

The test, whether the agreement is a lease, or only an agreement for a lease, is its completeness.[2] If nothing is left incomplete then the agreement is a lease; otherwise it is stamped with the other character. Thus, an agreement to let land to a company to place sand thereon, for a given period, was held to be an actual letting, and binding the parties thereto. In another case A wrote to B that he would take his house at a specified rent for two years if he would put a furnace therein, and B replied that he would accept the offer, and at once put a furnace into the house before the date was fixed for the term to begin. This was held to be a lease, and not a mere offer for one. One more illustration: A proposed to B, in writing, to hire a shop of a specified size at a fixed rent on a piece of designated land, if he would erect the building. B accepted the offer and built the shop, and A took possession. B did not own the land and did not complete the shop within the time stipulated. Nevertheless, by accepting the offer and occupying the shop, the agreement became effective. It may be added that the lessor's failure to complete the building by the time fixed in the agreement would have released the lessee, had he wished, from his obligation.

[1] "The importance of this distinction between agreements to lease, and agreements which operate as leases, results, among other things, from this: that, as an executed, written contract must speak for itself, and cannot be added to or corrected by parol, if the agreement be held to be a lease the parties will be bound by it, as written, with its *implied* as well as its express covenants and stipulations; whereas, if it is a mere agreement for a lease, these may be rectified or supplied before it is executed, or the party may refuse to execute it." 1 Washburn, § 622, p. 362.

[2] 1 Washburn, § 621, p. 361.

7. To make a valid lease of course the parties must be legally competent. If one of them is non compos mentis the lease is void unless it has been executed.

(*a*) Leases made by a minor are not void, but may be avoided. To have this effect some positive act on his part is required. A lease may be disaffirmed or avoided by a minor before he attains his majority, though the rule on this subject is not uniform in all states.

(*b*) A guardian may lease his minor's land during the period of his minority. Were the lease made for a longer period the ward could, if he pleased, after attaining his majority, have it set aside for the excess. A lease made by a guardian may be set aside or defeated by a new guardian. This principle is recognised in several states. The same rule applies to guardians of insane persons. A lease terminates on the death of a ward, whatever may have been the terms. Whether it would bind the lessee for the original term, if the heirs of the ward should choose to affirm the lease, is an unsettled question. A parent has not the same right as a guardian to lease or deal with the land of his minor child.

(*c*) Executors and administrators, who have a lease coming to them as a part of the possessions belonging to the deceased, may dispose of the whole or carve out smaller estates or interests by underletting. If there be two or more executors, a lease or transfer of the term by one of them, if purporting to be of the entire interest, will pass the same.

(*d*) Trustees who have a legal ownership of lands may lease them to any extent, as this is a right incident to

their ownership of them. Corporations also can lease their lands either with or without a seal.

(*e*) A single member of a partnership cannot make a valid lease of partnership land. On one occasion a partner leased his estate to the partnership, which was afterward dissolved by the death of a member. This event terminated the lease. A different rule would have applied had the lease been from a third person.

8. Passing from persons to property, we may inquire what can be leased. Besides land, various interests therein may be leased; for example, the right of wharfage, the right of flowing another's land with water, rights of way, and the like. But a widow cannot lease her right of dower before it has been set out to her.

9. Of course, a lease cannot be effective unless it has been accepted, which is often presumed. This question can hardly arise about a lease that is to go into immediate execution, but it may in regard to a renewal. Thus, a tenant had a lease for three years, with a right to hold for two years on the payment of a larger rent. Having paid the larger rent for one or two quarters of the second period, it was held that both parties were bound for the extended period.

10. A lease like any other conveyance of real estate must be recorded in order to bind subsequent purchasers or creditors. Not all leases though, only those that are to run for a period usually of five years or longer. This period, says Washburn,[2] in Massachusetts is seven years, in Kentucky five, New Hampshire seven, Delaware twenty-one years, if for a fair rent accompanied by pos-

[2] 1 Washburn, § 639, p. 372. In Louisiana all leases must be recorded.

session; in Maine seven years, in Michigan the same, in Ohio and New York three, in Rhode Island one, and in North Carolina all leases required to be in writing must be recorded.

11. A lease made for an unlawful purpose is void. For example, the lease of premises for the manufacture and sale of spirituous liquors, in a state where the business is condemned by law, would be invalid. But the mere knowledge on the part of the lessor that the premises are intended to be used for an illegal purpose, unless he participates in the design, will not render the lease invalid.[1]

12. (*a*) A lease usually contains both express and implied covenants. By an implied covenant is meant one created by law without any special words or language. The first that may be mentioned is a covenant or agreement for quiet enjoyment. The law assumes that the lessor, at the time of leasing his premises, is the legal owner and possessor; if the fact be otherwise he must make good to the tenant all damages accruing to him from the loss of possession.

(*b*) There is also an implied covenant against waste. The lessee assumes an implied obligation to use the premises in a proper manner and to keep the buildings in repair, and, failing so to do, he is liable, in an action called waste, for the damages sustained by the lessor. If there be no express agreement concerning repairs, the lessor is not bound to make any; but, if he undertakes or agrees to make them, he is bound by an implied

[1] Nor can the lessor plead the immorality of her calling as a defence against the payment of rent. Lyman v. Townsend, 24 La. Ann., 265.

covenant to do this in a workmanlike manner, without injuring the lessee. The courts tend strongly to minimise all implied covenants or agreements, thus rendering the written lease the entire agreement between the parties. Such a change in the legal attitude toward the parties is more in harmony with the spirit of the age and with the principles of justice.

(*c*) Another distinction concerning these covenants must be noted. Some of the covenants are personal and bind only those who made them; others run with the land and bind other persons beside their makers. Implied covenants are always personal; express covenants may run with the land, or may not.

(*d*) In general, a covenant that is beneficial only to the owner of the land, and that relates to its preservation or improvement, runs with the land. The most important covenants possessing this peculiar transmissible character are those for quiet enjoyment, to pay rent, insure, repair, deliver the estate in good condition, to reside on the premises, and to pay the taxes. Other covenants of this nature are those by a mill-owner not to let any other place or site for a mill of the same kind; or by a lessee not to sell any wood or timber, or to cultivate the land in a particular manner, or to raise only certain crops, or only on alternate years. These are good illustrations of covenants that run with the land, binding both parties to the lease for their performance.

(*e*) Covenants may run with a part of the land, and not with the entire portion.

(*f*) Who are or who may be affected by the covenants that run with the land? An assignee or a lessee would

be bound, but not a sublessee, and as he is not, of course his assignee would not be. On the other hand, the assignee of the lessor is bound.

An agreement to keep a house in repair runs with the land and binds the assignee, though he is not named. But a covenant to build a new house will not bind an assignee unless he is named, though, as another has remarked, "The good sense of this is not very easily discoverable." Yet, as we noted when setting out on our legal travels, there are many things in the law which do not square with sense; hence the need of legal knowledge to escape the pitfalls.

13. Often blank forms are used in making leases, and sometimes the printed and written agreements or clauses are inconsistent with each other. When they are, the written clauses are regarded as containing the true statements and intentions of the parties, and the printed ones, so far as they are inconsistent, must give way to the other.

14. A lessee is bound by an implied covenant to use the premises in a proper and husbandlike manner. What such husbandry may be depends largely on the place where the land is situated. Different rules, obviously, exist in different places. The tenant is bound to keep the soil in a proper state of cultivation, to preserve the timber, to support and repair the buildings; neglect of his duty in these matters will render him liable in an action for waste. Of course, the implied covenant or agreement may be modified or set aside by an express agreement. In one case a lease of a farm was dated July 18th, before the grass growing thereon was cut.

The lease was for five years, and in the fifth year the tenant cut the grass on the tenth of July, thus taking six crops of grass from the farm during his term of five years. This was held to be a violation of the rules of good husbandry. In Illinois it is the duty of the tenant to pay all the taxes during his tenancy; failing to do this, followed by its public sale and becoming the purchaser, he cannot hold the land against the owner of the inheritance. Where a lessee guarantees to pay the taxes assessed on the leased premises and fails to do so, the lessor can recover the amount assessed, although he himself may not have paid them. Furthermore, were the premises destroyed after the day of levying the tax and before the time of payment had expired, the entire tax would be recoverable under the lessee's covenant.

In a lease of real property containing machinery and other fixtures, questions often arise concerning its use, and the intention of the parties to the lease. A factory with its machinery which is leased carries the right to the use of the water-power for the operation of the mill. But the lease of a store or warehouse does not imply that the building is safe or well built, or that it is fit for any particular use. And the lease of a salt-well would be no assurance or measure of its capacity.

15. While the term continues the original lessor's right to the possession is so far yielded to the lessee that, if the lessor were to find the premises vacant, he would have no more right to enter them than would a stranger.

16. In many states, unless there is some restriction in the lease, a tenant may assign the lease or sublet the premises. Furthermore, an assignment of a lease that

must be in writing to satisfy the statute of frauds must also be written.

17. A lease may be so drawn that neither party can assign nor transfer it. To be non-assignable the terms must be very explicit; otherwise, on the death of the lessee, his executors or administrators can assign the term. In like manner a lease may be assigned by the process of insolvency. By such an assignment the estate passes, discharged of all covenants or agreements not to assign, if the proceedings are bona fide. Again, the retirement of a member of a partnership, and the taking of his place by another, are not a breach of the covenants or agreements not to assign the lease.

18. A transfer by a lessee of the whole or of a part of the estate, for a part of the time, is a sublease and not an assignment. In such a case the original lessor has no right of action against the sublessee, for he is liable only to his lessor. But a transfer of the whole or a part of the leased premises by the original lessee for the residue of the term is an assignment. In such a case the tenant having underlet a part of the premises for a part of the time, and then assigned to a third person all his interest in the original lease, his assignee could recover the rent from the one to whom his assignor had rented a portion of the premises.

Whether a lessee, in parting with his interest in his lease, assigns or underlets depends on the question whether he has parted with his entire interest. If he has then it is an assignment. If the period is to expire before the expiration of the original lease, then it is a subletting. The retaining of the smallest interest has

the effect of creating simply an underlease. In the case of a lessee who leased to another the premises for the residue of his term, reserving the right to recover possession on the last day, there was an underletting and not an assignment. In another case, that of a lessee who transferred his entire interest, reserving a rent larger than that specified in the original lease, with the right of entry in case of non-payment, there was an underlease and not an assignment. In short, a lessee who reserves to himself the right of entry for any period, however short, or under any condition in the event of the non-payment of the lease, simply underleases his term.

19. A tenant at will[1] has no estate he can assign to another whereby a relationship can be established between the original lessor and such a tenant.

20. The respective rights between the original lessor and the tenant of a lessee or sublessee are well settled. The lessor cannot sue the undertenant nor recover rent of him in any form of action.

21. Should a lessor sue a sublessee in possession of leased lands to recover rent, the latter will be presumed to be the assignee of the lessee until the contrary appears. A surrender by the lessee to the lessor which is accepted by him during the occupancy of another is conclusive evidence that the lessee, and not the occupant, holds the premises under the lessor.

22. As the lessee may assign or underlet his interest, unless he is forbidden to do so by agreement, in like manner the lessor can convey or assign his reversion in the land after the expiration of the tenancy, or interest,

[1] One whose tenancy ceases at the will or order of the lessor or landlord.

and thereby bring in a new party. In order to give effect to this transfer by the lessor, it is not necessary that the tenant should attorn to or acknowledge such grantee or assignee to render the transfer valid.

As a general rule, the transfer of a reversion carries with it the rent already due and accruing therefor. It is of little consequence how one becomes a reversioner as affecting his right to recover rent of the tenant or his assignee whenever it falls due.

If only a part of the reversion is conveyed the grantee or assignee may recover his share of the rent pro rata, which is determined by the relative values of the respective portions of the reversion. This principle concerning the apportionment of rent between several assignees applies to a reversion that has descended to several heirs. When this event happens one of them can sue for his part accruing after the death of his ancestor without considering the rights or interests of the others.

23. The rent and reversion may be separated by the lessor or owner. He may convey his entire estate, yet reserve the rent to himself. Or, again, he may assign the rent without granting the reversion, and the assignee may recover the subsequent accruing rent in his own name in an action of debt. The rent, however, cannot be apportioned by the landlord to different persons without the tenant's consent. Again, a lessor may give or devise a part of a rent which will be good without the tenant's consent, and the devise may be severed from the reversion.

When by an assignment of a reversion the rent passes, or vice versa, the assignee may sue in his own name for any rent accruing after making the assignment.

The assignee of a reversion of the land, or of the rent, should give notice of such action to the lessee or the tenant, otherwise he is protected in paying the rent to the lessor on his demand therefor. But no act done by the assignor, after the notice of such an assignment has been given to the other party, will be of any avail to him.

The assignee of a lessee who holds under a recorded lease containing a mortgage on the premises is bound to take notice of it.

24. There is a distinction between a special assignment of a lease by a lessee, and an assignment by legal process or by operation of law. In the former case the parties to the assignment are supposed to understand the terms and to assent to them. But no such result follows the assignment of a lease by the bankruptcy of the lessee, for the reason that the parties into whose hands it may come have not previously given their assent. Hence, in the latter class of cases, the assignee has a reasonable time to ascertain whether the lease can be made available for the benefit of creditors before he is required to make his election whether to accept the assignment or not. If the assignee accepts he can never deny the validity of the assignment in an action by the lessor for rent, nor can he escape liability for abandoning the premises before the lease has expired. An assignment of the lease does not change the lessee's liability under the express covenants or agreements contained therein.

25. The lease of a private residence is not a warranty that it is reasonably fit for habitation. Nor can a lessee, unless the lessor has misrepresented the healthfulness of a

place, abandon it on the discovery that it is unhealthful and escape paying rent. The law does presume that a furnished rented house is not infested with bugs. A learned law writer remarks that the law on this subject seems doubtful, and is confined strictly to furnished houses. We cannot help thinking that the same legal presumption concerning the presence of these animals should not apply alike to all furnished houses, to one in the foulest part of New York as well as to one on Murray Hill. Something besides location, ex. gr., the kind of people usually inhabiting a house, ought to enter into the proper determination of the question.

As a person who wishes to hire a house or other building can usually inspect it before making a lease therefor, the owner is under no implied duty that it shall be fit for the use intended by the lessee. In harmony with this rule, the mere omission to disclose a known defect is not a fraud; even the omission to declare a nuisance dangerous to health or life is not the landlord's duty. But, on one occasion, the lessor was declared liable for an injury arising from an undisclosed defect in the floor.

26. Unless the lessor expressly agrees to make repairs, he cannot be held for them. The lessor of a building let out in stories, each story being in the exclusive possession of the lessee, is not liable to the lessee on one floor for damages caused by imperfections in another floor without the lessor's fault. On the other hand, the lessor of a water-power impliedly agrees to keep in repair the canal that conveys the water, or the supply of water unfailing. But the grant of a right to take water from a well does not bind the owner to keep it in repair.

27. Should the premises be destroyed neither lessor nor lessee is bound to rebuild or repair, unless there is an express agreement in the lease to that effect. But if the lessee agrees to repair and restore the premises, and surrender them in good condition, he must abide by his covenant. It is said that even the impossibility of performance by the act of a third person, or by the act of God, affords no excuse for its non-performance. It is the party's folly that led him to make such a bargain without providing against the possible contingency.

28. The lessee is not absolved from paying rent through the lessor's failure to make repairs, even though he has agreed to do so; nor will this justify the lessee's abandoning the premises. His proper remedy is a proper action against the lessor on his agreement. In this he can recover such damages as he may prove to have sustained in consequence of the lessor's failure to keep his agreement.

29. Even though a building is destroyed by fire and the lessee is free from fault, he is bound to pay the rent, whatever may be the condition of the premises, unless relieved by agreement or statute. In applying this principle a farmer, who sought to have his rent abated in consequence of the destruction of an important bridge, failed in his contention. Nor would an oral stipulation not to exact rent should a building burn down be of any avail, for this would contradict the written agreement, which the court will not permit. And if by specific agreement the payment of rent is to be partly or wholly suspended after the destruction in part or wholly of the premises by fire or other accident, this does not mean

their gradual decay, and in such a case the lessee must continue to pay rent as before.

From this hardship the tenant has been relieved in many states by statute. This generally provides that the tenant of a building that has become untenantable by fire or gale without his fault is not bound to repair, and may, if he pleases, surrender and abandon it.

30. Unless the rent is payable in advance, or a time is subsequently fixed in a lease, it is not due until the end of the year; if payable quarterly, it is not due until the end of the quarter. When payable at a particular date, it cannot be apportioned with respect to a part of the time on such a date.

31. An agreement to pay rent is not affected by a lessor's agreement concerning insurance. Should the lessor insure his property and the building be burned, the tenant has no right in equity to have the money applied to rebuild the premises, nor to restrain the lessor from suing for rent until the structure is restored. But, if the money is to be applied by agreement to repair or rebuild, then it is like other covenants which run with the land, and the lessee is entitled to the benefit of it.

32. (*a*) A lessee who is evicted or turned out of the premises by the lessor, or by a person having a still better title, is discharged from paying rent after such unwelcome treatment. But there can be no eviction until the tenancy has actually begun.

(*b*) Any act done by the landlord, or by his direction, which lessens the value of the premises to the tenant, he may treat as an eviction. A landlord who entered and partly destroyed a summer house thereby evicted his

tenant. In one case a lessor let some strenuous pigs into grounds rented for exhibition purposes, which rooted it up, rendering it unfit for use; this was an eviction.

To darken the windows of leased premises by erecting a new building is not an eviction, but if the tenant's premises are thereby rendered unfit for use, he is clearly justified in abandoning them. A curious illustration is given—the case of a distillery that was leased to a tenant, whereafter the landlord prevented him from getting a license to run it. It was useless. In another case a landlord failed to furnish heat as he agreed to do; as the premises could not be inhabited, the tenant was justified in fleeing from them.

More generally any act by the landlord or by his direction, though not directly interfering with the enjoyment of the premises, but rendering their occupation incompatible with health and comfort, the tenant may treat as an eviction. Thus, to establish a smallpox hospital next to his grounds leased by a tenant, or to desposit gunpowder or create some offensive institution, saloon, or the like, that would render life unendurable to his tenant, would be an eviction. Of course, whether the particular act possesses this character or not is purely an inquiry of fact to be determined in the usual manner.

(*c*) A lessor who enters and evicts the tenant wrongfully from a part of the premises suspends by his conduct the entire rent until possession is restored. An actual ouster from a part may be treated as an eviction from the whole.

(*d*) The eviction must be done by the lessor or by his

order, or by a person having a title paramount to the lessor's. An act done by a stranger, as the law calls him, by which is meant a wrong-doer as distinguished from one who asserts a paramount title, will not justify an abandonment by the lessee. Thus, the erection, by an adjacent owner, of a wall that darkens the windows of the leased premises will not justify the tenant in putting on his hat, walking out, and declining to pay further rent.

(*e*) After a tenant's eviction from a part of the premises by one who possesses a paramount title, the rent will be apportioned and must be paid for the remaining part. If the eviction is by the lessor himself the tenant may elect whether to abandon the premises entirely and put an end to his tenancy and rent altogether, or to retain such part as remains, free from liability to pay any rent, so long as the eviction continues.

Suppose a person is evicted by the state in the exercise of eminent domain. Must he continue to pay rent? In Missouri the rent ceases; or, if evicted in part, he must pay rent in such proportion as the premises still occupied bear to the entire property leased. In some states he must pay rent to his landlord as before, and, having done so, can demand of the public compensation for the loss sustained through its action.

33. On the expiration of a lease some very nice questions often arise between the tenant and his landlord concerning the removal of many things called fixtures, which he may have attached to the premises during his occupancy. There is no occasion for difficulty in drawing the line between furniture and fixtures, because the former is clearly separated from the building and can

be removed without the slightest injury thereto; but fixtures are something attached to the premises, although some of them may be used as furniture.

(*a*) Different rules apply to persons in different relations. Thus, in the sale of a piece of land with a house thereon, the law favours the purchaser; as between these parties the law regards as fixtures many things, which are not thus regarded as between a landlord and tenant.

(*b*) The principal rule to determine what is a fixture in every case is that of intention; but this rule is, at best, an uncertain guide. Unhappily, after many years of judicial inquiry, varying decisions are still rendered. As a general rule, whatever a tenant affixes to the premises during his occupancy may be removed, if this can be done without material injury to them. Furthermore, a conveyance by the landlord will not interfere with the tenant's right of removal during his tenancy. But, if he has not been active and complied with the rules of law in removing his own while he was in possession as tenant, his right of removal is gone.

(*c*) For the purpose of establishing a more practical rule concerning their removal fixtures have sometimes been classified into trade and agricultural. This classification, however, has not proved helpful. The mode of annexation is another criterion. In England this doctrine plays a prominent part in ascertaining whether the thing annexed to the land is a fixture or not. At least three kinds of cases may be readily imagined for the application of this principle. First, the tenant of a mill may be hiring for a long period, and the structure itself may be built in a very enduring manner. An office is

needed, and he may construct one in harmony with the architecture of the other buildings, possessing an appearance of permanency in style, kind of material, etc. Should he do this a court would not be long in deciding that the structure was annexed with a view to permanency, and therefore as a part of the real estate. Again, an office may be erected either on blocks or in parts that can be readily removed. A court would just as quickly decide that the form of structure indicated clearly enough the intention of the tenant to remove it at the end of his tenancy. The third example may be given—that of a structure erected very cheaply, and not in harmony with the other buildings. A court would just as quickly decide that the tenant had no thought of removal, but simply intended to leave it there on his departure, as a thing not worth further notice. From these examples it is evident that the mode of annexation, which plays such a prominent part in the English law, does not afford a luminous rule for the determination of the question. In some cases it will yield a satisfactory answer; in others none whatever.

(*d*) For fixtures unlawfully removed by the tenant the owner of the land may maintain an action against him to recover the value of them, which is technically called an action of trover, or he can maintain an action to recover the things themselves, such being known as an action of replevin.

Sometimes the question arises in purchasing fixtures with real estate, honestly supposing that both were included, though, in truth, the fixtures were not, whether the real owner can recover them. If, for example, a

thing is hired by a tenant and annexed to the land, which is afterward sold to a bona fide purchaser, can the real owner recover the thing itself? Doubtless, he would have a good claim against the vendor or seller for the value of the things, but some courts have declined to give him any other remedy. In all cases in which persons have notice of the ownership of fixtures, they cannot be bona fide purchasers of the same. It may be added that, in conveying land, an oral exception of the fixtures is invalid, because such a reservation is a contradiction of the written deed, and no principle of law is better understood than that the form of a writing cannot be contradicted by oral evidence.

(*e*) Lastly, the silence of a lessee who erects a building on his land, and, at the expiration of his term, takes a new lease of the premises and says nothing about the building, is regarded as an abandonment of his right of removal. It, therefore, becomes a part of the land itself, as the new lease carries the building with its fixtures; and the lessee, by accepting it, adopts this construction. Nor will equity interpose in favour of a tenant, however expensive may have been his improvements, who has not removed them during his tenancy, unless he has been prevented from removing them by injunction. In such a case he is entitled to a reasonable time to remove them after its dissolution.

(*f*) A different construction is put on a lease that terminates by the landlord's forfeiture. It is said that the tenant's right to remove fixtures is gone, whether this occurs by the ending of the lease or by an entry for forfeiture. Thus, a tenant who held over after the

expiration of his term could not remove fixtures after his landlord had actually entered on the premises. The tenant's right to remove them is incidentally determined by the landlord's re-entry. This is the clearly settled rule; but a tenant holding for an uncertain term has a reasonable time to remove them after the close of his tenancy. In one of the cases, wherein a lessee was holding for an indefinite period, he erected an ice-house and filled it with ice. Doubtless, the lessor was watching him, for soon afterward he terminated the lease. Nevertheless, the tenant was permitted to sell the ice as soon as he could, which took nearly two months, and then to remove the house. In other words, he was given a reasonable length of time to secure his property. Again, an agreement with the lessor whereby the lessee has the right to remove fixtures at the expiration of his term, implies within a reasonable time afterward. And a tenant who has been wrongfully restrained from removing his fixtures will also be allowed a reasonable time to remove them after the restriction has been removed.

On the other hand, a tenant for an uncertain term who terminates the tenancy himself before removing his fixtures loses his right to retain them.

34. For an injury sustained by a third party by a defect in the premises of a tenant, the law presumes that the tenant, and not the landlord, is responsible. But this is only a presumption, which may be set aside by fact. The liability to a third party depends usually on the question whether the tenant has the entire control of the structure which caused the injury, or is only one of several tenants. For example, one who is travelling along the

street, and is injured by ice or snow falling from an awning, may recover from the tenant who has the sole control of the building. If the owner has a general control, or of the roof, or occupies a portion, he will be liable, instead of the tenant, to the injured person. For an injury resulting from the erection of the building itself, or from a defect in its construction, the landlord is responsible. Again, if the leased premises are, at the time of leasing, a nuisance, the landlord is liable for creating it, though the tenant may also be liable for continuing the nuisance. These principles, however, have been changed in many states by statute.

Other principles of similar nature may be mentioned. When a person leases land bounded by a street, which the tenant agrees to keep in repair, and a passer is injured—by defective grading, for example—the tenant alone is liable, even though neither he nor the landlord knew of the defect. But neither is liable for defects in a highway caused solely by the wrongful act of another; the public alone is responsible. Again, a passer who is endangered by an excavation made by a builder and afterward continued by a tenant, may recover from either. Lastly, one who dedicates to the public across his land a way which is accepted, though unsafe, is not responsible to a person who is injured in using it.

A tenant or owner of land is not responsible to another who is injured by an act done without his agency or permission. For example, neither tenant nor owner could be held for the obstructive act of a third person to a watercourse, causing injury to a mill-owner below.

35. What rule applies to tenants in apartment houses? A tenant who is injured from the defective condition of a part of a house not included within his own lease, but which he can use in common with the other tenants, has no redress against his landlord. On the other hand, a landlord who has entire control of the defective part of the house is liable to his tenant for any injury derived therefrom.

A lessee, unless restrained by the terms of a lease, may use the premises for any lawful purpose he may choose, though this may be different from the purpose intended, if not essentially affecting or in any way injuring the premises. In one case a person hired a house for a hotel, making no agreement concerning the mode of its occupancy, and converted it into a seminary. The lessor had no ground for complaining. On the other hand, if the mode of occupancy is fixed by a lease, the tenant may be enjoined from using the premises otherwise; indeed, a misuser may have the effect of working a forfeiture of the lease. The lessor may expel him, as a landlord did whose tenant used for an auction room a shop that was rented to him for the dry goods shopping business. Often, though no special damage results from a changed use of the premises, the lessor's right to eject the lessee is unquestioned.

36. Everywhere courts are strict in not declaring a lease forfeited. In other words, every effort in harmony with justice will be made to preserve it. Thus, a lease contained a covenant not to assign or underlet; also a condition, that, if the lessee failed to pay rent or committed waste, the lessor might enter and expel him. An

assignment by the lessee was held to be a mere breach of the agreement, and nothing more.

Before a lessor can avail himself of his right to enter into possession and terminate the lease because of the lessee's failure to observe all the agreements or covenants therein, he must do several things. First, if the reason for entering be that the lessee has not paid his rent as promised, there must be a demand when it is due and payable. In like manner, if a lessee is to pay the taxes, the lessor before entering to enforce a forfeiture for neglect on the part of the lessee to pay them, must demand their payment. Again, this must be done at a convenient time before sunset. Lastly, the demand must be made at the most notorious place on the land—the front door of the dwelling-house—unless some other place has been fixed by agreement.

A lessee may avoid forfeiture by tendering the rent due at any time before midnight sufficient to count the money; and, if no place is fixed for making the payment, the tenant may save a forfeiture by going on the premises at the proper time and actually tendering it there.

In order to save a forfeiture for non-payment of rent, if the lessor brings his action of ejectment and the lessee brings the money due the lessor into court, it will stay the proceedings, provided the failure to pay was by accident and not wilfully done. An illustration may be given to show the extent to which courts will aid parties who are not in fault in this regard. A lease provided for the payment of rent in Russia Sables Iron, for which the lessor had accepted money, for forty years, without objection. At the end of that time the lessor was over-

taken by some freak and demanded the iron, but there was none in the market and importations had long before ceased. The court, on the application of the lessee, gave him time to send to Russia for the iron before enforcing the forfeiture.

37. To yield up a tenant's estate for life or years to the lessor is called a surrender, and has the effect of extinguishing all claim for rent that is not due. To do this requires a deed or note in writing in order to satisfy the statute of frauds. Nor would this effect be changed by an oral agreement at the time of making the lease that the lessee might surrender it at any time he chose. Of course, a lease that does not exceed the term for which a parol lease can be made may be surrendered orally.

Again, the lessor and lessee cannot, by the formal surrender of a lease, affect the rights of a third party; for example, those of the lessee's subtenants.

38. The effect of taking a new lease before the expiration of the old one is to work a surrender of the first, unless both leases can stand. In one case, in which the first lease was to two lessees, and the lease back again was from one lessee only, this did not operate as a surrender. Again, when a lease is by one lessor to several lessees, one of these cannot affect the rights of his co-lessees by releasing or conveying to his lessor.

An oral lease may be substituted for an existing lease, even though this be under seal, if the substituted lease is binding by the statute of frauds, and is perfected by the lessee's possession. In such a case the new lease would work a surrender of the old one.

Sometimes a lease comes to an end by a merger.

This happens when a term for years and the following estate, or immediate reversion, meet in the same person in his own right, endowing him with full power of sale or alienation. This not infrequently happens, and, by such a union of both estates, the lease comes to an end. But estates that are held in different ways will not merge.

39. A lessee, in an action brought to recover possession of the premises, is not entitled to question his lessor's title, nor the rent he has promised to pay in an action for the use and occupation of land. The policy of the law will not permit a tenant to be guilty of denying the title of the premises whereon he has been living. Thus, a lessee whose duty was to pay the taxes neglected to pay them. The land was sold at public sale and purchased by the lessee, but he was not permitted to set up his title against his landlord. The rule would have been otherwise had he not been required to pay the taxes. Furthermore, he has no right to complain of a want of title in his lessor so long as he is in undisturbed possession.

The importance of this rule is evident, for a tenant is thereby prevented from acquiring a title by adverse possession against his landlord. The rule is so broad as to prevent a tenant, who has enclosed adjacent land long enough to acquire a title, from reaping the benefit of his action. His landlord, and not himself, profits by the acquisition. In such cases, so the courts declare, the tenant is acting for the benefit of his landlord—a kind of robber philanthropist, stealing for his landlord's benefit instead of his own.

In some cases a tenant has a right to contest his lessor's title; for example, after the expiration of the

lessor's title during the tenancy. For, in thus attacking the former landlord's title, the tenant is not disputing the validity of the title under which he entered. In such a case he may also set up an independent title acquired by himself.

40. Sometimes land is let on shares; when this is done different relations may be established. The land-owner and tenant may create the relationship of landlord and tenant, or the very dissimilar relationship of partnership. If the intention of the contract is that the farmer shall do the work as the servant of the land-owner, receiving for his services a fixed proportion of the crops, the contract is one of hiring and not a lease. Again, if the farmer is to be his own master, going on the land to plant, tend, and harvest the crops, which are to be divided, then the two parties are not tenants in common, except of the crops. But if the farmer, instead of acting as a licensee, is given possession of the land, though the rent is to be paid in produce, he is a tenant with all the incidents pertaining to tenancy.

Which of these relations exists when land is let on shares must depend on the construction of the contract. Sometimes these contracts are difficult to understand. In one of the cases the tenant was to cultivate and bag the hop crop as rent for the farm. The court held that the crop was the sole property of the land-owner. In another case an agreement between the two to share profits was held to be a partnership, because a division of profits necessarily implied this relation. There is a large number of cases, in which an entirely different rule has been declared, a division of the profits forming,

in the mind of the court, no proper test of a partnership.

41. From a tenancy thus created we will next consider a tenancy or estate created at will. This exists when a tenant has entered on land for the purpose of holding the same during the joint wills of both parties. The relation is not formed until the lessee has taken actual possession, and it may cease at the will of either party. To create this relation no rent need be fixed, no time set for the length of the occupation. "Such a tenancy cannot arise without an actual contract." When it does the tenant is entitled to a reasonable notice of his landlord's wish to end the estate before the latter can begin an action to regain possession. Thus, a tenancy was to exist for five years unless the lessor wished to build on the land; if he did, the lessee was to quit. This agreement, by providing for a notice concerning the lessor's intention to build, created a tenancy at will. If, without giving the notice, the lessor should enter and attempt to build, he would be a trespasser.

42. A tenancy created by words clearly showing an intention to endure only by the pleasure of both parties is an estate at will, though the rent may be payable by the year or lesser periods. If the tenant is to pay the rent at certain intervals, and the lessor terminates the tenancy between them, he cannot require any rent to be paid from the time of making the last payment. And the same principle is applied when the lease is by parol and the tenancy is ended by the lessor between the rent days. Thus, a parol lease is for a year, and the rent is payable quarterly. In the interval between two payments the

lessor sells the premises and the purchaser notifies the tenant to quit, which he does before another quarterly rent falls due. The tenant is not liable for the rent after the last payment.

43. A tenancy at will may be implied by the law. Thus, a householder permitted another to occupy his house free of rent. This was a tenancy at will. In another case the owner of a chapel and dwelling-house placed a minister in them as a minister of a congregation. Another instance may be given—that of a person who is let into possession of land under a contract to purchase or lease it. Generally, a person who, by the owner's consent, takes possession of land without any facts or reason showing an intention to create an estate from year to year, is a tenant at will.

44. A tenant at will cannot acquire or create an estate that will avail against the owner of the land. If the tenant leases it this will be good between him and his lessee so long as the tenant enjoys the premises. A tenant at will who assigns his interest ends the tenancy, nor can the assignee claim the rights of the tenant at will against the original lessor.

45. Rent is not always incident to a tenancy at will. It often depends on circumstances whether such a tenant is chargeable for the use and occupation of the land he is occupying. For example, should a purchaser enter by virtue of a contract of purchase and sale, which fails by the vendor's fault, the vendee would not be liable for the use and occupation of the land, save by express agreement. To make the vendee liable it must be shown that his occupation was by the purchaser's permission.

If he is there without this permission he is liable only as a trespasser, if at all. Again, a purchaser who is in possession under a contract to purchase, and refuses to perform his part, is liable for using and occupying the premises, but he is not a trespasser. By his refusal to perform his part he annuls the conditional license whereby he entered, and acts without it.

46. At the expiration of the relation the tenant at will is entitled to the crops, but, if he abandons the land before they are ripe, he loses them, unless his abandonment was forced by his landlord. Nor can the latter, by conveying the land with the growing crops, impair the tenant's right to them.

47. Any act or declaration indicating an intention to terminate the tenancy is sufficient for that purpose. On the part of the lessor a notice to quit, the demand of possession, an entry on the land whether the tenant is present or not, the carrying off of stone or trees against the tenant's will, the sale or lease of the land—all these acts clearly indicate, on the part of the lessor, an intention to end the tenancy.

The death of either party also ends the estate; by the lessor's death, the lessee becomes a tenant at sufferance. Should the lessee die, his personal representative would have no right to the possession of the land after his death. If there be two lessors or two lessees the death of one does not terminate the tenancy.

In like manner a judgment for possession against the lessor, or an assignment of the lessor's estate under a process of insolvency, would end the lease.

On the part of the tenant an assignment of his interest

would put an end to the tenancy. It has been said that this is not so unless the landlord has notice of it; and, until received, he may treat the lessee as his tenant and require him to pay the rent.

Though a tenancy at will may be ended in the manner above described, the law will not treat the lessee as a trespasser, should he enter within a reasonable time after the termination of his lease for the purpose of removing his crops or other property. This period is a fact which must be ascertained in every case by itself.

48. For a long period the courts have sought to protect the interests of lessees against the sudden ending of their tenancy. To protect them more perfectly the courts finally required a notice to quit from landlords to their tenants before they could be actually expelled. This is obviously a just requirement, and the rule thus established by the common law has been greatly extended by statute, both in England, where the rule was first adopted, and also by all the states of the Union.

This notice is now largely regulated by statute, and there is not much need of saying more, except to give a brief description of the kind of notices required.

49. The notice to quit must be distinguished from the notice required to be given before undertaking summary proceedings to recover possession of land. The object in giving the notice is to enable the tenants to remove their crops and other property, and thus be less at the mercy of their landlord than they would be, should he come

immediately into possession by his own sole act, and claim and retain everything. At first the courts simply declared that the notice should be a reasonable one, but they have since fixed more definite times and rules to govern the parties interested in the possession of real property.

50. Of course, it may be fixed by agreement, and this will prevail over any statute. Generally, unless a time is thus fixed, it will be equal to the interval between the times of paying rent, as by the quarter, month, or week, or other period.

If, by agreement, or other construction of law, a tenancy is at will, though it may have been otherwise in the beginning, no notice to quit is necessary to end the relation unless required by statute. Again, if the tenant-relation, that once existed, has been destroyed, no notice is required before the landlord can avail himself of his legal right to recover possession of the land. Thus, if a possessor of land repudiates this relation, or sets up a claim that is hostile to his landlord's, no demand for possession, or notice to leave, need be given. Again, notice to a tenant who is in possession under a condition which is fulfilled, is not required. For example, a building was let to a person for a school, so long as he kept a good one. Failing to fufil this requirement, the owner had a right to take possession without giving him any notice.

51. Finally, an illustration of terminating a tenancy at will without giving notice is that of selling the land itself. Such an act is regarded as equivalent to a notice, and the tenant must act accordingly.

§ 6. Tenancy from Year to Year

1. Who is such a tenant.
2. Tenancy founded on contract.
3. Notice to quit.
4. Tenancy cannot be changed against lessee's will.
5. Nature of tenancy.
6. Repairs.
7. Notice to quit.
8. Service of notice.
9. Liability for rent.
10. Waste.
11. Revival of tenancy.
12. How lease is affected by statute of frauds.

1. A class of estates has been established with this name possessing essentially a modern character. They are founded on oral or parol leases, and usually require six months' notice for their termination.[1] A tenant who is permitted to remain without such a notice into a second year is regarded as having a lease for another year, and so on. Consequently such a lease continues until either

[1] "The length of time required to be observed in giving notice is regulated by statute, and generally varies with the length of the periods between the payments of rent. If it be a yearly rental, the English rule, which is followed in some of the states, requires six months' notice; while, in some other states, a shorter time, usually three months, is required. If the rental be for a period less than one year, as by the quarter, the month, etc., then, as a general rule, the notice must be for as long a time as the periods of payment. If the statute requires notice, but the length of the notice is not stated, it is held that a reasonable notice must be given. And the parties may always, by special agreement, control the length and other provisions of the notice." Tiedeman, Real Property, § 218, p. 186.

party gives the other the notice required for its termination.

2. To establish the tenancy it must appear that there was an entry or letting for an indefinite time, or an agreement to pay rent measured by the year or fractional parts, or an actual payment if none was originally fixed. Though the hiring for a term within the statute of frauds is a tenancy at will, it is converted into a tenancy from year to year by slight evidence of this intention of the parties. If one should merely authorise another to go on land and cut wood at an agreed price, a tenancy from year to year would not be established, and, consequently, the contractor would not be entitled to a notice to quit.

3. When the lease is for one year or other certain term no notice to quit is needful, although, if the tenant holds over, he may be held at the election of the lessor as a tenant for rent at the rate originally fixed.

4. Merely to suffer a tenant to hold over, without any act or assent on the part of the landlord, will not change the relation into a tenancy against the lessor's will, or prevent him from maintaining an action of trespass, or ejectment of the tenant as a wrong-doer.[1]

5. A tenancy from year to year has many of the qualities and incidents of a term for years. The lease may be assigned; the lessor may be liable to the tenant in the same manner as if the longer relationship of a tenancy for years existed between them. Both parties have the same rights with respect to strangers as in the longer relationship. The tenant is liable for rent should the premises burn down.

[1] 1 Washburn, § 801, p. 499.

6. Tenants from year to year are not bound to make substantial repairs unless they have agreed to make them. Independently of contract, it has been said that a tenant from year to year must keep the premises wind- and water-tight and make fair tenantable repairs, put up fences or repair windows and doors that have become broken during his occupancy. But he is not liable for the wear and tear of the premises, nor answerable if they are burned down, nor bound to repair them if they become ruinous by accident, nor to make general repairs.

7. Both parties are equally bound to give notice in order to end the tenancy. Of the form of notice it may be said that, if the lease has been made by three, notice by two will not suffice: all must join. The notice may be oral, unless the statute, or an agreement, requires the notice to be in writing. It must clearly indicate the time for the tenancy to expire—the end of the year, quarter, month, and the like. A tenant who comes into a house in the middle of a quarter, and pays rent on the regular quarter days, begins his tenancy at the first regular quarter day, and a notice to quit must conform to that time. Should entry into different parts of the premises be made on different days the notice is considered as beginning on the date when entry was made into the principal part of the estate. What this part may be is a question of fact for the jury to decide.

8. In interpreting a notice the courts seek to construe it broadly, in order to make it effective; and unless the party notified has been misled by the time indicated, the notice will be sufficient. If the tenant states to the lessor's agent a day as the end of the lease, to which the

notice conforms, the tenant is bound even though this proves to be a mistake.

The notice must be served on the landlord's own tenant, and not on a subtenant of his lessee. In one case the premises consisted of a shop, and the lessee took a partner, making, however, no new contract with the lessor. The notice was served on the partner during the lessee's absence, and this was sufficient to determine the tenancy. The notice may be made personally or left at the dwelling-house of the tenant with a servant, but not simply on the premises. If left in the latter manner the service will not suffice unless it appears that the tenant actually received it.

By the common law rule, when the tenancy is yearly, notice must be given six months before the expiration of the year. When the period is for a shorter time it is technically a tenancy from year to year, though the notice need not be given except for the quarter, month, or week, during the existence of the tenancy.

9. The tenant's liability for rent continues until the end of the lease, whether he actually occupy the premises or not.

10. By committing voluntary waste he forfeits all right to the notice to quit, for, by so doing, he terminates the estate.

11. A tenancy may be revived, after giving notice, by accepting rent for a longer period. If rent was due at the time of the serving of the notice, and is afterward received, this does not revive the lease, for it is simply the payment of a just obligation which has already accrued.

12. By the statute of frauds an oral or parol lease

can have a legal effect only for a short period. In many states the lease is invalid if exceeding three years from the time of making it. In one state, Florida, an oral lease may be made for two years. In much the larger number a lease for more than a single year is contrary to or "within" the statute of frauds, as the books say, and invalid.

§ 7. Tenancy at Sufferance

1. Who is a tenant by sufferance.
2. How tenancy arises.
3. Cannot deny his landlord's title.
4. Cannot acquire title against landlord.

1. A tenant who has come rightfully into possession of lands by the owner's permission, and continues to occupy them beyond the time for which this was given, is a tenant at sufferance. In the language of the law, he is one who comes in by right and holds over without right. Yet he is not a trespasser.

2. Such a tenancy may arise in various ways; for example, after a tenancy for years has expired, or a tenancy has come to an end by the death of the lessor, or by his selling his land. Another example may be given because it is so common: a mortgagor remains in possession after his land has been sold; in short, anyone who continues in possession without agreement after the end of a particular estate by which he first came into possession is a tenant at sufferance. His original possession in all cases, therefore, was by virtue of an agreement, for when

one remains under any other condition he is not a tenant at all, recognised by the law, but simply an intruder or trespasser who can be treated accordingly. Indeed, in some states, the law declares that a tenant who seeks to remain in possession after the expiration of his lease may be treated by the lessor as a tenant from year to year, or as a trespasser, just as he pleases. The tenant, if the land-owner chooses to dignify him by that name, can exercise no election in the matter. In other states a different rule prevails, and he is regarded as a tenant at sufferance.

3. Of course, he cannot deny his landlord's title. The moment the parties agree to any kind of holding, tenancy at will or otherwise, the former relation ceases. Thus, a landlord, by accepting rent from him, would terminate the tenancy by sufferance.

4. A tenant at sufferance cannot avail himself of his position to acquire a right to the premises by adverse use or possession. He is not entitled to notice to quit before the summary process for his removal, unless the statute requires one to be given. In this country, however, the statutes have been everywhere enacted for giving notice in nearly all cases of tenancy. And this is a safe practice to follow in dealing with such persons.

§ 8. By Joint Tenants and Tenants in Common

1. What is a joint tenancy.
2. How created.
3. Abolished in many states.
4. What is a tenancy in common.

5. A tenant cannot convey a particular part of the estate.
6. Nor acquire a title against the others.
7. Nor maintain an action of trespass against another tenant.
8. Can recover his share of the profits.
9. How the estate may be divided.

1. A joint tenancy is defined to be the holding of land by several persons by purchase. Though the estate may be a single one outwardly, yet, between themselves, each is entitled to his share of the rents and profits so long as he lives, and, on the death of one of them, the survivor or survivors take the entire estate.

2. A joint tenancy can be created only by purchase or act of the parties, and not by descent or act of the law. It must be created by one and the same act, deed, or instrument, and have a fourfold unity. The interest must be acquired by all, by the same act, begun at the same time, and held by the same title and possession. The most objectionable characteristic of a joint tenancy is the right of survivorship, whereby the estate finally comes into the possession of a single individual. Two corporations, therefore, cannot be joint tenants.

3. This kind of ownership of land is contrary to the policy of American law, and, in many of the states, has been abolished by statute. A joint tenant cannot acquire, by adverse title, the interest of the others; nor can he sue or be sued alone. If anyone wastes the joint estate the others have an action against him. Either tenant may convey his share to a co-tenant, or even to

another who thereby becomes a joint tenant. Of course, a joint tenant cannot devise his estate Lastly, a joint tenancy may be dissolved by voluntary partition, or by a statutory one whenever the tenants themselves are not willing to divide.

4. A tenancy in common exists when two or more persons hold land by several and distinct titles. The unity between them is that of possession. Thus, one may be an absolute owner, another for life; one may have acquired his title by purchase, another by descent; one may hold a fifth, another a twentieth. Nevertheless, they are tenants in common.

Lastly, an estate conveyed to several in unequal shares, in consequence of having contributed unequally toward the purchase, belongs to them as tenants in common and not as joint tenants.

5. Although each tenant can alienate his share, he cannot convey any particular part of the estate. Nor can one of several joint owners dedicate any portion to the public. In like manner a deed of one co-tenant's share, reserving his share of the mines in the same, would be void.[1] He cannot create a right of way over the common estate.

6. As their possession is in common, no one of them can acquire a title by adverse use against the others. The possession of one tenant in common is deemed to be the possession of all. It is held to be a fraud for one tenant to suffer the common property to be sold for taxes and to purchase it for himself. Should he do so the tax-title would inure to the benefit of all. But, should the interests of the co-tenants be separately assessed,

[1] Adam v. Briggs Iron Co., 7 Cush., 361.

there is no rule to prevent one from buying at public sale the title and interest of another.

7. A tenant in common cannot maintain an action of trespass against another co-tenant. This can never be done unless the party charged has done something inconsistent with the rights of the other co-tenants. The act must be an eviction or destruction of the property, in order to give the tenant the right to proceed against the others. But a tenant may have an action of waste against his co-tenant either by statute or at common law. If one tenant should cut timber and sell it, the co-tenants could recover their respective shares of the proceeds.

8. A tenant may recover from his co-tenant his share of the rents and profits of the common estate. Of course, there can be no recovery unless the co-tenant has taken more than his proper share.

Though a tenant cannot be made to pay rent to his co-tenant for permissive sole occupation of the land, he may be held accountable for what he receives as a rental. If he ousts his co-tenant and occupies adversely to him, he is liable for the rent. In Vermont one of several co-tenants converted the common land into a race-course, and cut down trees growing thereon, but was obliged to account both for the timber and for the profits of the race-course.

Independently of statute, a tenant in common cannot compel his co-tenant to contribute to the cost of improvements. But the expense to which a tenant is subjected for the preservation of the common property may be ratably apportioned among them all; for example, pay-

ments for necessary repairs, a mortgage, taxes, assessments, and the like.

9. Finally, the statutes in all of the states provide for the partition of tenancies in common.

§ 9. License

1. What is a license.
2. Kinds.
3. An executory license may be revoked.
4. A license can always be revoked where no party will suffer.
5. Death operates as a revocation.
6. When a license is executed the license is protected.
7. Can a license partly executed be revoked?
8. When the law implies a license to the purchaser.

1. A license is an authority to do an act or series of acts on another's land, without acquiring any estate or ownership therein. It includes authority to do whatever is necessary to accomplish the end desired. It may be created orally, as it conveys no interest in the land, but simply a permission to use or occupy. An eminent jurist once remarked, "the publican, the miller, the broker the banker, the wharfinger, the artisan, or any professional man who ever licenses the public to enter his place of business in order to attract custom, is a licensor, but, when the business is at an end, the license also comes to an end. Thus, one may open a way across his land for a public thoroughfare. Should he do so this would be regarded as a license for people to pass over the same."

2. Licenses are of two kinds: executory, in which an act is to be done; and executed, in which an act has been done. The distinction is important, as we shall soon discover.

3. An executory license may be revoked at the pleasure of the licensor. This is the law everywhere. Thus, A laid an aqueduct across B's land, who afterward revoked his license, and cut the pipe that conducted the water. A sought the interposition of a court of equity, which refused to interfere, declaring that B had a right to revoke the license at his pleasure.

Likewise, a license to cut a drain through the licensor's land, or build a culvert or dam, or flow land, or build and maintain a house, or lay water-mains, or cut trees, may all be revoked with respect to future action; but the licensee can remove his improvements.

Another example may be given: A land-owner erected a stand for spectators at a horse race, and sold tickets to all who wished to attend. Before the race was over the owner ordered one of the spectators to leave the premises, and afterward removed him. The court held that his ticket was a mere license which could be revoked at the owner's pleasure. The same rule has been applied in the case of a play at a theatre and a concert. But, if the purchaser suffers in any way by his removal, he is entitled to damages.

Another case may be mentioned—that of minerals—in which a licensee, after having incurred great expense, was forbidden by the owner to mine any longer. The revocation was declared to be valid, and the licensee was without a legal remedy.

4. A licensor may always revoke his license when the parties would be left in the same condition as they were before granting the same. This principle may be readily applied to licenses to fish in water belonging to another, or to hunt in his park, or to use his carriageway.

5. It is also a rule of law that the death of either party works a revocation of a license. So does a transfer of the interest of either party in the subject-matter. Thus, oral permission was given by a land-owner, who sold the timber growing thereon, to another to take it out by a particular way. Afterward, he sold his land without mentioning the license. The purchaser was not bound to observe it.

6. The execution of a license relieves or excuses the actor from liability, otherwise he might be considered a trespasser. Thus, one who licenses another to tear down a mill-dam, or lay an aqueduct in his land, or cut down a tree, has no cause of action against the others, though he may have been greatly injured. Nor does this permission invade the statute of frauds pertaining to land, as no interest is conveyed therein.

7. The most difficult question perhaps relates to the revocation of a license after the licensee has enjoyed or exercised the privilege and incurred expense—erected, perhaps, a costly structure on the licensor's land. The licensee's rights in all cases of this kind are strictly construed. Thus, should a license be given to another to erect a dam, this would not convey authority to rebuild it if it were destroyed.

In many of the states the courts maintain that a license by virtue of which the licensee has incurred

expense—for example, has erected a dam for the purpose of operating a mill—is not revocable. This principle is founded on the doctrine that an executed license transfers an absolute right to the licensee, because, after revocation, he is not restored to his original condition. The contrary doctrine is founded on the idea that the licensee, if permitted to exercise a license beyond the control of the other party, acquires an interest in land without a writing, and thus infringes the statute of frauds. An answer to this may be made that there are ways of acquiring land without a writing, of which adverse user is a daily illustration.

8. The purchaser of an article, stone, trees, or the like, has a reasonable time to remove them from the land of the seller, for an implied license is given to him to effect their removal; nor can the seller forbid him from exercising, within a reasonable period, this right. Again, one who licenses another to cut trees on his land, with the intention of carrying them away, cannot revoke the license to remove those already cut in part execution of the license. But a revocation before any of them had been cut would be effective.

§ 10. By Mortgage

1. What is a mortgage.
2. Mortgagor need not be absolute owner.
3. Full terms of agreement are usually expressed.
4. When absolute deed is only a mortgage.
5. Mortgage for future advances.
6. Mortgage of after-acquired property.

7. Mortgagor's remaining interest may be subject to levy.
8. Distinction between mortgage and right to purchase.
9. Secret agreement:
    (*a*) Between immediate parties.
    (*b*) Nature of mortgage cannot be changed by another simultaneous agreement.
    (*c*) Can be by subsequent agreement.
10. Relationship of simultaneous lienors.
11. Mortgage with power of sale.
12. Mortgagee cannot purchase at his own sale and extinguish equity of redemption.
13. He can purchase at officer's sale.
14. Deed of trust:
    (*a*) Nature and terms.
    (*b*) May be made to secure future advances.
15. Creation of mortgage by depositing title deeds.
16. Vendor may have lien:
    (*a*) Who is affected.
    (*b*) On what theory it rests.
    (*c*) Will prevail against assignment for benefit of creditors.
    (*d*) Notice of lien.
    (*e*) Part payment by vendee.
    (*f*) Does not arise in favour of third party who pays purchase money.
    (*g*) Assignment of vendor's debt is an assignment of the lien.
    (*h*) Sale of land to satisfy vendor's lien.
17. Equity of redemption may be mortgaged.

18. No mortgage without a debt.
19. Different theories concerning operation of mortgage:
    (*a*) By one, estate belongs to mortgagee.
    (*b*) By other, estate belongs to mortgagor.
20. Changes in form of indebtedness do not affect debt.
21. Both may insure premises.
22. Mortgagee's remedy against mortgagor for misuse of the estate.
23. Mortgagee, by purchasing equity of redemption, acquires entire interest.
24. Mortgage to secure different persons and debts.
25. Mortgage by different persons of distinct land to secure joint debt.
26. Mortgages take effect in order of registration.
27. How far a devise of land includes a mortgage.
28. Mortgagee's interest descends to his heirs.
29. When mortgagor can claim damages of public for taking his property.
30. How a mortgage affects a policy of insurance.
31. Mortgagor cannot be charged with rent.
32. Mortgagor cannot deny mortgagee's title.
33. Who can redeem a mortgage estate.
34. Entire mortgage must be paid to have that effect.
35. Sale of land extinguishes the lien.
36. Redemption by mortgagor.
37. Redemption by one of several interested persons.
38. Usury as a means of defeating a mortgage.
39. How tender must be made in proceedings to redeem.
40. Mortgagee's presumption of ownership from possession.

41. Mortgagor's presumption of payment from possession.
42. Effect of payment by a volunteer.
43. Payment by a surety.
44. How payment may be proved.
45. Usually mortgagee gives deed of release.
46. On mortgagor's death his heirs may call on his administrator to pay.
47. When the heirs cannot do this.
48. Rights to purchase of holder of equity of redemption.
49. Courts will not thus apply estate of insolvent mortgagor.
50. Payment of joint debt by one. His right to contribution.
51. Rights of assignee of one of several parcels to contribution.
52. Liability of mortgagor of several parcels, who afterward sells one, to pay entire debt.
53. Rights of different creditors in same property.
54. Mortgagor's right to charge for personal service.
55. Accounting in action to redeem.
56. Action of foreclosure.
57. Effect of decree.
58. Mortgagee may assign mortgage.
59. Assignment must be in writing and recorded.
60. Mortgagor can assign. Rights and liabilities of respective assignees.
61. Rights of assignees of several debts secured by same mortgage.
62. After mortgagee's assignment he can release nothing.

63. Law of place of assignment governs.
64. Assignment of mortgage without the debt.

1. Another form of limited ownership is by mortgage. This is a lien on land to secure the performance of some obligation, usually the payment of money. After this has been performed the mortgagee's interest in the land ceases, and the mortgagor or owner is reinvested with as perfect right thereto as though he had never made the agreement. Usually, the mortgagor remains in possession of the land until he fails to execute his agreement. When this happens the right and the title of the mortgagee to the land become perfected either immediately or within a given period, as will be hereafter shown.

A conveyance intended, at the time of its execution, to be a security for the payment of money, is called a mortgage. Washburn says: "Whenever there is, in fact, an advance of money to be returned within a specified time, upon the security of an absolute conveyance, the law converts it into a mortgage, whatever may be the form adopted, or whatever may have been the understanding between the parties."[1]

2. A person need not be an absolute owner of land to make a valid mortgage. An owner for life, or for a shorter period, can mortgage his interest therein. An owner or tenant of land may mortgage the crops of fruit, or the fixtures that are to be attached to the land in the future. One in possession by virtue of a contract to purchase may mortgage the same.[2]

[1] 2 Real Property, § 980, p. 34.

[2] Mortgages are made also on the security of personal property; these will be considered in another chapter.

3. In a mortgage it is usual to express the full terms of the agreement. Yet this need not be done. The defeasance, as it is called, or terms for repaying the money, and closing the entire transaction, may be in a separate instrument. Usually, the entire contract is put in a single deed or conveyance, which is recorded. In some states—New York for example—two instruments are given—a bond and a mortgage. This is a very elaborate mode of expressing the obligation; a simpler form is generally employed.

4. A deed, though absolute on its face, if delivered for the sole purpose of creating a security for the repayment of money is, in truth, a mortgage; and this intention may be shown by oral evidence. This is the general rule.

5. The question, perhaps, is still open whether a mortgage can be made for future advances or liabilities. The rule may be thus stated: A mortgagee who has agreed to furnish advances under all circumstances, and who would be liable if not fulfilling his agreement, takes precedence of another mortgage, made after the execution of the first, for the amount advanced both before and after the execution of the latter.[1] Again, a mortgagee who makes voluntary advances after another mortgage, his refusal to make them not constituting a breach of his agreement, will have priority only for the amounts advanced before the execution of the second mortgage.

Lastly, a mortgage to secure future advances is not valid against subsequent encumbrancers who may make advances without any notice, except that given by the

[1] See § 14b.

record, of advances actually made. In other words, a mortgage containing a stipulation of this kind is not regarded as a notice to a subsequent mortgagee except so far as the record discloses an actual advance; nor does the law require a subsequent mortgagee in good faith to make any inquiry concerning what action has been taken by the parties to a preceding instrument in the way of future advances.

6. After-acquired property, buildings, improvements, fixtures, become a part of the land and are acquired by the mortgagee. What are fixtures as between a mortgagor and a mortgagee is a question largely of intention, as in other relationships that have already been considered. Washburn says that the principle is very broad, including trade-fixtures attached to buildings by bolts and screws, although they may be removed without injury to the freehold. It also applies to whatever is added to a railroad under mortgage, and to all improvements made on mortgaged premises. Neither the mortgagor nor his grantee can claim an allowance for the same.

7. A levy may be made on the mortgagor's estate or interest in the land still remaining, and afterward it may be sold to satisfy the claim of any other creditor.

8. A distinction exists between a mortgage and a right to repurchase the land by the debtor. If the transaction is merely a right to repurchase, on the debtor's failure to comply strictly with the agreement all his right to the estate is gone. If the transaction is a mortgage then the mortgagor or debtor has an equity of redemption still inhering in him to obtain the land. Whether the trans-

action is the one thing or the other is a question of intention that must be determined by the circumstances in every case. The courts are always inclined to regard the transaction as a mortgage.

Nor can oral evidence be interposed to show that a deed which appears to be a mortgage was intended as an absolute conveyance. While this rule prevails everywhere, the converse proposition is not true, that a deed, absolute on its face, cannot be changed by evidence showing that the parties intended to create a mortgage. Again and again has this been done. Among the facts that are of great weight in determining whether the transaction is a sale or not, with the right to repurchase, is the adequacy of the consideration. When this is a small sum for the property it is a strong circumstance in favour of regarding the transaction as a mortgage, for it is not reasonable to suppose that the vendor intended to part with his property at a grossly inadequate price, unless the reasons why he should do such a thing are clearly brought to light.

9. Secret agreements, not appearing on record, do not bind parties having no notice of them:

(*a*) As between the parties themselves and those who may know, they are often effective, but no principle of real estate law is better understood than this—that all arrangements, not open, are not binding on subsequent purchasers or parties who act in good faith. Thus, in most, if not all, states, defeasances must be recorded, and, after this is done, the law at once assumes that everybody has notice of them; so long as the record discloses nothing, no such notice is presumed, and, therefore, a bona fide

purchaser or a creditor who might attach the estate would not be affected by knowledge, afterward acquired, of the existence of a defeasance.[1]

(*b*) An agreement between parties, which, in fact, is a mortgage, cannot be changed in character by any other agreement made at the time between them relating to the redemption or other matter pertaining to the transaction. "The right of redemption," says Washburn, "attaches as an inseparable intent created by law and cannot be waived by agreement." The universal rule, therefore, is, "if once a mortgage always a mortgage." The law will not permit, for the sake of public policy, a mortgagor to embarrass or defeat his right to redeem the estate by any agreement which he may have made in order to effect the loan.

Indeed, the courts are so careful to guard the rights of mortgagors to redeem that they will relieve against any agreement limiting the redemption to a fixed time, or restriction to a specified class of persons, or giving to the mortgagee, after the mortgagor's default, a right to purchase the estate at a particular sum. These limitations show the intent of the courts to guard, in every possible way, the rights of the mortgagor, and thus prevent him from parting with his property beyond all hope of recovery.

(*c*) This rule does not preclude a subsequent bona fide agreement concerning the disposition of the estate between the parties. A mortgagee may always purchase the mortgagor's right of redemption, and, in this way, acquire an absolute title to the land. The courts will

[1] See 2 Washburn, § 997, p. 52.

carefully scan the transaction, but if the contract was fair and adequate it will be sustained.

10. Two creditors who obtain simultaneous liens on the debtor's land become tenants in common because their equities are equal, or rather because no discrimination can be made between them. But, if a debtor should make two mortgages simultaneously, one to his vendor to secure the purchase money, and the other to a third person to secure an independent debt, the vendor's mortgage would take precedence over the other.

11. A mortgage may be made with a power of sale in the mortgage, whereby, on the non-payment of the debt at the time prescribed, a valid and absolute estate may be conveyed to the purchaser. In executing a power of sale the mortgagee is the trustee of the debtor. Of course, he must act honestly and proceed in a way that will best serve the interests of the mortgagor. The parties may establish the terms of the sale, and, in all cases, the power must be strictly pursued, or the sale will be invalid. Moreover, the power passes with the estate by agreement and is not affected by the mortgagor's bankruptcy or death.

A mortgagee with such a power who conveys his whole estate passes the power also. But, if he convey only a part of the estate, as the power, from its very nature, cannot be divided, he can still exercise it, though not in a manner to interfere with what he has sold. After making a sale of the estate under the power, should there be a surplus, the mortgagee is a trustee for the mortgagor. If the mortgagor is dead at the time of making the sale his heir, and not his executor, can claim the surplus. In

the way of a further application of this principle, a purchaser of the mortgagor's equity of redemption would be entitled to the surplus.

12. A mortgagee cannot purchase at his own sale and thereby extinguish the equity of redemption, even though the sale be public. This rule may be set aside by statute or by the terms of the mortgage. Whenever the sale is fraudulent it can be set aside. The utmost good faith is required on the part of the trustee.

13. A different rule applies to a sale made in good faith by an officer of the law. At this the mortgagee can be the purchaser, though some courts contend that the sale may be avoided, as the officer in making the sale is really acting in the capacity of agent for the trustee.

In some states there are statutory regulations concerning such sales; where these exist they must be executed, in letter and spirit.

14. Sometimes deeds of trust in the nature of mortgages are executed. In these a third person is brought into the transaction as an executor.

(*a*) The terms of the trust usually are, that the trustee shall reconvey to the grantor if he executes his part of the agreement, or, after failure to do this, shall sell the estate and apply the proceeds in satisfaction of the debt. The deeds are usually made by large corporations that wish to raise means on their properties, and are likened to mortgages rather than regarded as real ones.

In the deed the trustee may be authorised to sell the estate, or this power may be executed by another. The terms of the deed fix the rights of the several parties and prescribe how the property may be foreclosed and sold.

(*b*) A deed of trust may be made to secure future advances as well as present loans. Acting as agents of both parties, debtor and creditor, the conduct of the trustees, when requiring judicial examination, is carefully scrutinised. They cannot become purchasers of the estate, though the question whether the creditor in whose favour the trust has been created can become a purchaser or not has been answered in different ways.

15. In England a mortgage may be created by depositing title-deeds. This mode seems to be founded on reason because, in that country, until very recently, deeds were not recorded. The power to create this kind of a mortgage has been repudiated in many states in this country; and has been recognised only in a few of them.

16. A vendor may have a lien for his purchase money, and this lien is virtually a mortgage.

(*a*) This right affects all purchasers, even those who have no notice of the lien, and the vendor may, by virtue thereof, take the estate like a mortgagee. If, however, the vendee should mortgage the estate to a third person, who should put his deed on record, he would acquire a valid lien over the vendor supposing he has acted in good faith in making the mortgage. This kind of lien, though not prevailing everywhere, does prevail in a majority of the states.

(*b*) It is founded on the theory that, until the purchase money is paid, the vendee holds the land as a trustee of the seller for the purpose of securing it. Wherever this lien is recognised, no agreement is needful to create it, and it is presumed to exist until the contrary is shown.

This lien is purely a matter of equity and is unknown to

the common law. It prevails on the ground that otherwise the vendor would have no remedy, and that in justice he ought to have his purchase money secure in preference to others who may acquire liens afterward on property which in truth, until he has been paid therefor, really belongs to himself. Of course his lien may be defeated by any act showing his intention not to rely on the land for security. What such an act is cannot always be defined. An express waiver would be effective, likewise the taking of collateral security, bond or note with the security of an endorser, or a deposit of stock.

(*c*) A vendor's lien will prevail against an assignment that is made for the benefit of creditors, provided the vendor enforces his lien before the assignee executes his trust. But when land is attached by virtue of a levy of execution issued on a judgment against the vendee, the lien will not prevail.

(*d*) With respect to the notice of a vendor's lien, it is said that any notice, sufficient to put any reasonable man on his inquiry, will suffice.

What is a sufficient notice to charge a second purchaser with knowledge of the vendor's lien is an open question. If the original vendor remains in open possession, especially if the purchaser learns of any agreement relating to the land, this will suffice—in short, any notice that would put a reasonable man on inquiry. Thus, a purchaser who knows that a part of the purchase money is unpaid, is in law notified of the lien. Again, notice to an agent of the purchaser or to his solicitor is a notice to the party himself.[1]

[1] 2 Washburn, § 1029, p. 81.

(*e*) A vendee who has paid any part of the purchase money for land before the delivery of the deed to him, has a lien for the amount advanced. It has all the characteristics of a vendor's lien, and may be enforced in the same manner.

(*f*) This lien does not arise in favour of a third party who pays the purchase money to the vendor for the purchaser and takes his note for the amount.

(*g*) The assignment of a debt secured by an express lien on property by agreement between the parties will give the assignee the benefit of the lien also. Therefore, the assignment of the vendor's claim for the purchase money carries therewith his lien, whether express or implied. This rule does not prevail in every state. In some of them the lien is personal, and does not pass by an assignment of the claim.

(*h*) The lien may be enforced by a court of equity by ordering the sale of enough land to satisfy the lien. This cannot be done by a collateral proceeding, but only by a suit brought for the purpose.

17. A mortgagor having an equity of redemption may mortgage this by successive deeds which will take precedence in their order of execution. Indeed, he can make any number of subsequent mortgages, one after the other, as if none had been made on his estate. Of course the interest acquired by each subsequent mortgagee is subject to the interests of those who preceded.

18. There can be no mortgage without a debt. This must be sufficiently described so that it can be recognised and distinguished from other obligations. It must in-

volve a personal obligation which is independent of the mortgage.

19. Two different legal theories are held concerning the operation or nature of a mortgage, and these must now be explained.

(*a*) One theory is that the mortgagee thereby acquires the estate which formerly belonged to the mortgagor who can reacquire it by paying the loan. Furthermore, the mortgagee retains his ownership until the mortgagor fulfils his agreement. The actual estate is in the mortgagee, the mortgagor is simply a reversioner having a right to repossess himself by performing the prescribed condition.

(*b*) By the other theory the mortgagor is the owner of the land and remains so until he fails to fulfil the agreement on his part, after which the mortgagee becomes the owner. This is known as the "lien theory," and is rapidly growing into judicial favour. Thus, in a recent case in Kentucky, the Court of Appeals remarked: "The law is well settled that a mortgage is a mere security, and, both at law and in equity, the mortgagor is the real owner of the property mortgaged; and a mortgagee has no lien upon the rents and property unless he has, in the mortgage, stipulated for a specific pledge of them as part of his security; nor is he entitled to the insurance which may be collected by the mortgagor upon the buildings upon the property, unless the mortgage expressly stipulated that it shall be for his benefit."[1]

20. Any change in the form of indebtedness for which a

[1] Gill v. Corinth Deposit Bank, 68 S. E. Rep., 870, 871.

mortgage is made will not affect the debt. Its existence will remain just the same. Nothing short of actual payment, satisfaction, or release will discharge it. The giving of a new note, therefore, for the original one, with a different date and amount, unless intended as payment, will not affect the lien.

21. Both mortgagor and mortgagee may insure the premises. The latter can only insure for the amountof his debt. In taking out a policy in his own name and paying the premium, he takes the insurance money, in the event of a loss by fire, free from any right of the mortgagor to have it applied for the liquidation of the mortgage debt. He can, if he pleases, require the insurance to be paid, and then proceed to collect the debt. But, if he insures at the request of the mortgagor, or in consequence of his neglect and at his expense, the mortgagor will be subrogated to the benefit of the insurance, and the money must be applied to the debt.

22. As between a mortgagor and a mortgagee, the latter has his remedy against the former for any misuse of the estate. He may sue him as a trespasser, or in an action of waste for improvident or unreasonable use. In like manner the law holds the mortgagee to a like account, when he is in possession of the premises, for using them in any way inconsistent with the legitimate purposes of the security.

In much the same manner as a tenant for life can be enjoined from misusing his estate, as previously described, the mortgagee may enjoin the mortgagor from committing waste. If the mortgagor leases the premises subject to the mortgage, and the tenant is recognised by the

mortgagee, he becomes the latter's tenant, and cannot be treated as a trespasser.

23. A mortgagee who purchases the equity of redemption acquires the entire interest, and becomes the sole owner; the estates of both mortgagor and mortgagee are merged into one.[1]

24. A mortgage is often made to several persons, sometimes to secure two separate debts, sometimes to secure one or more joint debts due to the mortgagees. If the mortgage is made to secure separate debts the interests of the mortgagees are several and not joint, but the amount of the respective interests in the mortgaged property is measured pro rata by the respective amounts of the other debts. If the debt be joint the mortgagees are joint tenants of the mortgaged estate, and a release by one of the mortgagees would discharge the mortgage. As soon as the mortgage has been foreclosed and the legal estate made absolute, it is converted into a tenancy in common between the owners. If one of two joint mortgagees dies before the mortgage is foreclosed the survivor may bring an action for that purpose.

25. Two owners of distinct parcels who mortgage them to secure a joint debt charge both parcels equally for a moiety of the debt.

26. Successive mortgages duly registered take effect in favour of the successive holders in the order of registration. This is simply an application of the general rule that registration is a constructive notice to all persons

[1] "This is not necessarily so, but, on the contrary, when it is not the intention of the parties that it shall merge, or when it is not to the interest of the mortgage that such merger should take place, the mortgage continues to subsist." See note, 99 Am. St. Rep., 162.

having knowledge of it. But when two mortgages connected in the same contract are made to two parties, respectively, neither gains any precedence over the other by recording his deed first; their equities are still equal.

In many states a judgment takes precedence of an unrecorded mortgage.

27. How far a devise of land will pass a mortgage thereon is an unsettled question. The more general rule is, in devising one's real estate, mortgages are included in this term. On the other hand, a devise of money securities includes a note secured by a mortgage. A testator, who, after making his will devising his land, forecloses a mortgage existing at the time of making his will, transfers it as real estate.

28. On the death of a mortgagee his interest in the estate mortgaged descends to his heirs. This is the rule at law, but in equity both mortgaged interest and debt go to the executor or administrator, and the heir cannot release the mortgage. On one occasion the heirs of a mortgagee conveyed the premises before the mortgage was foreclosed. This was held not to operate as an assignment of the mortgage. An executor or administrator may assign one. This authority is given him by statutes in most of the states, and therefore the executor or administrator of a mortgagee may recover possession of the land thus secured, and must account for the same as personal assets.

29. In some states, on taking land for eminent domain, the mortgagor may claim damages; likewise for flowing his land with water in states where this right is given to

mill-owners. Again, in laying out a highway or in repairing a street, the mortgagor, if in possession, is deemed the owner and proceedings must be conducted accordingly. The taxes are a lien which are assessed on the mortgagor if he is in possession.

30. In some policies of insurance there is a clause stating that the sale of the estate by the insured will avoid the policy. But, in some states, a mortgage of land is not such an alienation as will avoid the policy.

31. A mortgagor cannot be charged with the rent before the mortgagee has obtained actual possession, even though the land is an inadequate security for the debt. The same rule applies to rent accruing after the beginning of a process for obtaining possession.

32. A mortgagee, by accepting a deed from his mortgagor, cannot deny his title; but a mortgagee may purchase an outstanding prior title, and hold thereby as paramount to his mortgage title. A mortgage is not negotiable, and, consequently, an assignee takes it subject to the equities existing between the original parties. Where the lien theory prevails the bona fide endorsee of a negotiable note secured by a mortgage is entitled to enforce the security notwithstanding the equities existing between the original parties. But this rule does not apply unless the assignee is entitled to the privileges of a bona fide endorsee against the maker.

33. Any person interested in a mortgaged estate has the right to redeem it—the various mortgagees, heirs, devisees, creditors, and other parties. The owner of an interest, however small, has an equal right with others to redeem and thus save his own interest.

34. The entire debt must be paid to work a redemption of the mortgaged estate. Nothing short of this will release the mortgagee's interest. But an offer of payment made at the proper time is effectual to bar a foreclosure of the land.

35. A sale of land on the foreclosure of a mortgage extinguishes the lien thereon, whether the entire debt thus secured is satisfied or not.[1] Of course, the mortgagee still has a valid claim against the mortgagor for the unsatisfied balance. Therefore, as the mortgagee's lien is discharged by a sale of the property, a judgment creditor or other interested person who should offer to pay the mortgagee all that he has paid for the property at the sale with the interest, if any has since accrued, may become the owner of the property without paying the unpaid balance of the mortgagor's indebtedness.[2]

36. A mortgagor who redeems regains his estate as fully as if no mortgage had ever been made. Therefore no lease, charge or encumbrance made by the mortgagee during his qualified ownership can be set up against the mortgagor.

37. One of several persons who redeems a mortgaged estate by paying the whole debt becomes and remains an equitable assignee of the mortgage, until the respective parties interested therein contribute their due proportions.[3] But if two tenants in common join in mortgaging the common property to secure the debt of one of them, and the other then conveys his share to the mort-

[1] First National Bank v. Elliott, 125 Ala., 646.

[2] Same case.

[3] See § 50.

gagee, the one whose debt was secured must pay the whole debt to redeem his share of the estate and thereby relieve the other share.

38. One who purchases or acquires by assignment an estate subject to a mortgage, or a right in equity to redeem an existing mortgage, cannot set up usury in the mortgage to defeat or diminish the claim of the mortgagee. In like manner one who purchases an equity of redemption at a sheriff's sale cannot deny the validity of the mortgage itself. But one who purchases a mortgaged estate, or takes a second mortgage thereon, may take advantage of any defect in the mortgage in the same manner as the mortgagor himself could do.

39. In legal proceedings to redeem tender of the amount due must be made. But if the mortgagee has done nothing to prevent the mortgagor from performing his part of the agreement, he will be entitled to costs.

40. A mortgagor may be barred of his rights to redeem when the mortgagee has been in possession of the land adversely for the requisite period. The law presumes by such a long possession that the equity has been extinguished. But no length of possession by the mortgagee will bar the mortgagor's right to redeem, if the mortgage has been treated throughout the period as a security for the debt. In other words, to make the mortgagee's action effective to extinguish the rights of the mortgagor, he must act in a manner openly adverse to the other's rights.

41. On the other hand, the law will presume payment of the mortgage from long-continued possession by the mortgagor without paying rent or interest, or admitting

the existence of the debt. When payment is thus presumed from lapse of time, of course the mortgagee cannot bring a bill for the foreclosure of the land.

The tender must be made by someone who is entitled to redeem. Anyone who has an interest in the mortgaged premises has this right. Among these may be enumerated the grantees, subsequent mortgagees, judgment creditors, heirs, devisees, and the like.

A tender, thus made by a person having the right to redeem at the maturity of the debt, works a complete discharge of the mortgage, and the mortgagee no longer has any right or interest therein. Furthermore, if the mortgagee should be in possession, an action of ejectment would lie against him just as against any other wrong-doer, to turn him out of the premises.

42. Payment of the debt by a volunteer—that is, a stranger who is not interested in the mortgaged premises—will not extinguish the mortgage unless an assignment is actually made to him. Nor can he claim an equitable assignment, even though he has paid the debt. Again, payment by one who is not under a prior obligation to pay, but is secondarily liable as a surety or as an endorser, does not always operate as a discharge of the debt, but the payee may, by thus paying, become, in equity, the mortgagee. In other words, if his interest requires that the mortgage should be kept alive after having paid it, a court of equity will regard the transaction as an assignment of the mortgage to him, and not as a discharge of it.

43. The payment of the debt by a surety operates as an assignment of the mortgage to him, and he can enforce it against the mortgagor or his heirs and assignees. He

is, in truth, only secondarily liable. The mortgagor is the primary debtor and the land is a primary fund out of which the debt must be satisfied.

44. Payment of a mortgage may always be proved orally or by any facts which clearly evince a payment or discharge of the obligation. Possession of the note by the mortgagor is not always absolute evidence that the debt has been paid when this can be satisfactorily explained. Without explanation the mortgagor's possession creates a strong presumption that it has been paid.

45. Usually, on payment of the mortgage, the mortgagee gives a deed of release or formal discharge, which is put on record, thus showing that the encumbrance no longer exists. Ofttimes this is omitted, or the release given to the happy mortgagor, he has forgotten to have recorded; and so the cloud remains on the title, to the great vexation, it may be, of someone at a later period, who may wish to sell or purchase the property.

46. On the death of a mortgagor his heirs may call on the executor or administrator to pay the mortgage out of the personal estate, for the reason that it was primarily given for the benefit of the personal estate of the deceased. In like manner a devisee can call on the executor or administrator to pay the mortgage, and thus relieve the real estate of the encumbrance. This principle extends no further, and legatees, both general and specific, as well as creditors, can make no such demand on the executor or administrator.

47. But an heir who sells an equity of redemption that descends to him, without exercising his right to have the mortgage paid out of the personal estate, cannot after-

ward call on the executor or administrator to discharge the mortgage. This rule is of general application.

48. In like manner the holder of an equity of redemption who has acquired it by purchase has no right in equity to call on any other fund for the relief of his own estate.

49. The courts will not apply the personal property of an insolvent estate to discharge a mortgage. Nor can the personal assets existing in one state be used to relieve the real estate in another state of any encumbrance existing thereon.

50. One of two persons, jointly liable for a debt, who pays the whole has a right to call on the other for contribution in proportion to their several interests. And a person entitled to redeem, though interested only in a part of the land, if he pays the entire debt, as against others jointly interested with him, gains the place of the mortgagee. In law he is said to be subrogated to his place; in other words, acquires all of his rights. Consequently, he can foreclose the mortgage against them if they refuse to pay their pro rata share of the debt. This is not a personal liability, and, consequently, they can refuse to pay upon surrendering their interests in the land to the mortgagee, or to one who has paid.

51. Again one of two or more parcels of land, simultaneously conveyed by a mortgagor to different persons, may be sold under a foreclosure. In such a case the assignee or grantee of that parcel has a right to recover from the assignees of the other parcels their pro rata share of the debt. The debt is a liability among them in proportion to the value of their respective parcels.

When the assignments have been made successively or at different times, the courts have had great difficulty in establishing a rule to govern parties in such relations. Perhaps the best rule is to regard the liability of the respective parties as accruing in the reverse order of assigning the property. In other words, the first assignee is the last one to be held liable, and the last assignee is the first one who must be held liable for the payment of the mortgage. By this rule, therefore, he is held for the entire amount. Should he be unable to pay all, the next preceding assignee would be liable, and so on until the first was reached.

52. A mortgagor, who, after executing his deed, conveys parcels of the mortgaged property to persons at different times by warranty deeds that contain no reference to the mortgage, is primarily liable on the land he retains for the entire mortgage debt. This, therefore, must be first sold to satisfy it, and, if insufficient, then the mortgagee must resort to the parcels conveyed and sell them in the inverse order of purchase.

53. Another principle applies in the case of two or more parties interested in the same mortgaged property. Suppose a creditor holds two mortgages on two different estates to secure one debt, and a creditor of the same debtor has a later mortgage to secure his debt on one of the parcels. Equity requires the first mortgagee to exhaust the security he has in the parcel not covered by the second mortgage before proceeding against the latter parcel. In like manner a mortgagee who holds collateral security in addition to a mortgage must first exhaust his mortgage security before calling on the surety. So, also,

a senior mortgagee must exhaust so much of the mortgaged property that does not secure a junior mortgagee before resorting to the property on which the junior mortgagee relies.

54. With respect to a mortgagee's right to charge for personal services in taking charge of an estate, collecting the rents, etc., the general rule is that this cannot be done except when it is necessary to employ a bailiff or agent to do the business. If he occupies the premises himself he cannot charge a commission for his services.

55. In an action to redeem, the mortgagor may call for an accounting by the mortgagee. This will be ordered whenever the mortgage debt involves a long account of charges. Such an accounting is especially necessary when the mortgagee has been in possession of the land, and has received the rents and profits, and has expended money in keeping the premises in repair. The case is, then, referred to a Master in Chancery, who determines the whole matter.

In conducting this accounting the two leading questions are, what are lawful debits and lawful credits? The mortgagee will be charged with whatever rents he may, or ought, to have received in managing the estate. He will also be charged with all damages done to the premises by himself or by others with his authority or permission. Thus, he is liable in damages for opening a mine or for letting the premises fall into decay. On the other hand, he is entitled to credits for all proper expenses incurred in maintaining the buildings. An author says that the true rule seems to be that he would be allowed only such expenses as he incurred in making repairs that were

necessary to keep the premises in the same condition as that in which he received them; and for such improvements beyond that limit that were necessary to the ordinary and reasonable enjoyment of the premises. In some states he has been entitled to the cost of lasting and permanent improvements of a truly beneficial character.

56. To bar the mortgagor's equity of redemption and acquire the absolute title to the property, the mortgagee must bring an action for foreclosure. There are two kinds or species of this remedy. The first is called a strict foreclosure. By this a decree is rendered barring the mortgagor's equity and vesting the absolute estate in the mortgagee if the debt be not paid within a certain time after rendering the decree. The other is called an equitable foreclosure, and is the remedy in most general use. When this is granted the court renders a decree ordering the property to be sold and the proceeds to be applied in liquidating the debt. If any surplus remains, this is paid over to the mortgagor. The bill to foreclose may be filed at any time after the mortgagor's failure to comply with the agreement to pay his obligation; in other words, after his failure to pay his debt or debts as he has promised to do.

All persons interested in the determination of the suit should be made parties. This includes all subsequent purchasers, other mortgagees, persons holding judgments, judgment creditors, and the like. There is a question, sometimes, concerning the mode of ranging them on one side or on the other of the action. Those who are not made parties in bringing of the proceedings should be summoned as parties to defend them.

It is needful to summon all parties for the reason that, should any be omitted, they would not be affected by the decree rendered by the court. In strict foreclosure the decree makes the estate absolute in the mortgagee. The legal estate descends to his heirs instead of to his personal representatives.

57. The effect of a decree on a minor is to bind him unless, within a period of six months after arriving at majority, he can show some error in the foreclosure. If this is by a sale of the land the minor cannot disturb the title acquired under the decree. Judgment in such cases is binding for the reason that the chancery courts have jurisdiction over minors, and are supposed to adopt sufficient precautions to protect their interests.

In a suit for strict foreclosure there can be no action on the surplus of the debt remaining unsatisfied. A mortgagee who wishes to collect the unsatisfied balance must open the foreclosure, and have the property sold under judicial decree, and enter the amount of the judgment against the debtor.

In the ordinary cases of foreclosure, as we have stated, the proceeds of the sale are applied to the liquidation of the debt, and, if these are not sufficient, the mortgagee has a remedy in an original action at law to recover the balance. It will thus be seen that the debt is not extinguished by taking the land. This is simply a security, and the debtor is still liable, if enough cannot be obtained to extinguish the debt.

If there be more than one mortgage, and if a surplus remains after paying the expenses and the first mortgage debt, the balance goes to the junior mortgage; if there

be several, then to them in the order of the priority of their claims. Should there be a surplus after paying all the mortgages, the balance belongs to the mortgagor, or, if he be dead, to his estate.

58. A mortgagee may assign his rights; his assignment should be prepared in a manner as formal as the original deed of mortgage. This should be recorded also in the same manner, to give all parties notice of the transaction. This is the proper manner of making an assignment. Thousands of cases have arisen in consequence of the neglect of parties to fulfil this simple and proper requirement.

59. Sometimes an assignment is written on the back of a mortgage itself, and is delivered, with the mortgaged deed. This transfers absolutely the interest of the assignor, but the potency of the transfer, with respect to other parties, depends on the notice they receive of the transaction.

60. The mortgagor also may sell or assign his remaining interest. The assignees enjoy all the rights and assume all the liabilities of their respective assignors. If the mortgagee is entitled to possession so is his assignee, who may also appropriate the rents and profits, as the mortgagee could have done had he remained in possession. The assignee of the mortgagor, on the other hand, has a right to redeem the estate, and call upon the mortgagee to account for the rents and profits received by him, as if he had been in possession.

61. The assignees of several debts, secured by the same mortgage, that have been successively assigned, will share the benefit of the security pro rata. If the debts

secured by the same mortgage are payable at different times, they are to be paid from the mortgage fund in the order in which they are due. The holder or owner of a mortgage made to secure several debts may assign one or more of them in such a manner as to give the assignee a preference over other debts. In applying this principle some difficulty has arisen when the same mortgage deed secures several different debts which have been transferred by the owners to different individuals without assigning the mortgage. In some states the mortgage is regarded as a separate mortgage for each debt, and an assignment of one of them carries therewith its proportion of the mortgage interest; and, in the distribution of the proceeds springing from the sale of the land, they are paid to the several holders in the order in which their debts became due.

62. After a mortgagee has assigned the mortgage he can discharge no part of the premises from the mortgage by a release. While he holds it he is not obliged to enforce the mortgage pro rata on the several parcels, though belonging to several different persons. He can elect to enforce it on all or any number of them, and any oral agreement at the time of making the mortgage, embracing several parcels, to discharge any one of them on the payment of a certain sum, is inoperative. Nor can a mortgagee, by releasing several parcels, throw more than a pro rata share of the mortgage debt on the other parcel or parcels.

63. In assigning a debt secured by a mortgage the law of the place where the agreement is made will govern. When the transaction is regarded as a transfer of real

estate, then the law of the place where the land is situated must be applied.

64. Where the mortgage and debt are inseparable, and they are so regarded in many states, an assignment of the mortgage without the debt would be void, and a person occupying under such an assignment would be a trespasser. Where the mortgage and debt are separable, the debt can be assigned without changing the record. In all cases the safest mode of procedure is to make a formal assignment in writing, like a deed, and record it.

When an assignment has been made in a less formal manner the above question has arisen between subsequent parties, attaching creditors, and the like, and the original mortgagor and mortgagee. As no uniformity exists in the decisions of the courts on this long series of questions, we shall not attempt to deduce any rules from them.

§ 11. Easements. Rights of Way, Light, Water, Etc.

1. Easement defined.
2. How created.
3. How classified.
4. How acquired.
5. Sale of dominant estate.
6. Easement cannot be increased.
7. Selection of way from necessity.
8. Effect, on easement, of dividing dominant estate.
9. Acquisition of right of way by prescription.

10. Prescription does not run against a minor.
11. Tenant cannot acquire a right against his landlord.
12. How time is computed.
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14. Acquisition of a prescriptive right by the public.
15. Owner must confine himself strictly to the use of his right.
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18. What acts will work an abandonment of it.
19. Acquisition of easement of light and air.
20. How acquired.
21. Cannot be easily gained.
22. Right to enjoy a prospect.
23. Easement in water.
24. Diversion.
25. Quality cannot be injured.
26. Surface water. Right of upper owner.
27. Right of lower owner.
28. Draining a swamp, well, etc.
29. Priority of use.
30. Underground springs.
31. Right to cut ice.
32. Lateral support.
33. Party wall.
34. Right to lateral support of highway.
35. Right of mine-owner.
36. Right to maintain an offensive trade.
37. Right of fishery.
38. Rights in division fence.
39. Rights in a wharf.

40. Landing-place.
41. Right to take gravel, etc., from land of another.
42. How easements may be lost or destroyed.
43. What are acts of abandonment.

1. An easement is the right of a land-owner to use the land of another for a special purpose. The owner who has this right is called the dominant owner; the other, whose land is thus used, the servient owner. These rights may relate to the use of a way, water, light, and air, support of the soil or buildings, party walls, etc.

2. To create an easement two estates must exist belonging to different persons, for no man can have an easement in his own land. Consequently, by becoming owner of both estates an easement is extinguished. In other words, "the exercise of the right which, in other cases, would be the subject of an easement, is, during the continuance of his ownership, one of the ordinary rights of property only, which he may vary or determine at pleasure. The inferior right of easement is merged in the higher title of ownership."[1]

3. Easements are divided also into affirmative and negative ones. The former permit something to be done on the land of another; for example, to pass over it, or to discharge water thereon. A negative easement consists in prohibiting one from doing something which would otherwise be lawful for him to do; for example, interrupting light and air from a building, or diverting a natural watercourse whereby the water is prevented from flowing to an ancient mill.

[1] Kieffer v. Imhoff, 26 Pa., 442.

4. Easements may be acquired in three ways: by express grant; by implied grant; by prescription. Many easements are acquired in the former manner by a deed or writing. When thus created the deed itself defines the nature of the easement. Many also are implied. Thus, A sells to B land enclosed or surrounded on all sides by other lands belonging to A. As there is no way for B to reach his land except over A's, the law implies that, at the time of the sale, A intended to give the purchaser a right of way somewhere over the land still retained by himself. In like manner, should A sell a piece of land, reserving a portion in the centre, the law would imply the right on his part to travel over the land thus conveyed to another, in order to reach his own. Thus, it will be seen that the rule works in both directions to create ways of necessity, and the same principle applies in other cases. By prescriptive easement is meant the acquiring of a right by such use of a particular thing for a prescribed period as to create legally a title or right to its use. Thus, suppose A should walk over the land of B in a particular path for twenty years, claiming during that period the right to go there, he would, at the end of that period, acquire by prescription or adverse user, in legal phrase, the right to continue to go in this manner indefinitely; indeed, as perfect right may be acquired by going in this way for a period fixed by law, openly and adversely, as can be acquired by a written deed.

5. The sale of the dominant estate includes the easements belonging thereto, even though they are not necessary to the enjoyment of the estate by the grantee.[1]

[1] See § 15.

6. An easement cannot be increased beyond its original character.[1] Thus, should A sell to B a field for ordinary cultivation with a right of way thereto from the highway, he would have no right to divide the field into house-lots, build up a village, and subject this right of way to a larger use than originally intended. But a footpath acquired by prescription, by the members of one family residing on the dominant estate, may be used by other families residing on the same estate.[2]

7. The choice of the location of a way selected from necessity falls on the owner of the servient estate, who must select a route with due regard to the convenience of the owner of the dominant estate. Should the former fail or refuse to make the location, the owner of the dominant estate may do so, also having due regard to the other's reasonable convenience. When the way has been selected it cannot be changed by either party without the consent of the other. The same doctrine applies in locating an aqueduct or any other easement. In applying this rule to trees, should A sell his land to B, reserving the trees growing thereon, he thereby reserves a right to enter on the land and to cut and carry them away. On the other hand, should he sell the trees, the right to enter and carry them away would likewise pass with the grant. Again, in applying this rule to mines, should one sell land and reserve the mines therein, this would also include the right to pass over the land sold and do whatever would be necessary for carrying into effect the privilege or right retained.

[1] 2 Washburn, § 1234, p. 278.

[2] Baldwin v. Boston & Maine R. R., 63 N. E. Rep. (Mass.), 428.

8. Sometimes a dominant estate to which an easement is attached is divided, and the question then arises concerning the future of the easement. The owner or assignee of any part may claim a right to the easement so far as it may be needful to the enjoyment of his property, provided the burden or charge of the easement on the servient estate is not increased. In one case a person sold a piece of land opening on another lot, which the grantee guaranteed should remain open for purposes of light, etc. The grantee sold a part of his estate to C, and then the original grantor, having sold the open lot to D, the latter began to build thereon. On the application of C, the court restrained D from continuing his purpose.

9. It is often difficult, with respect to prescriptive estates, to determine whether the right has been fully acquired. Originally, the time for gaining the right was a date anterior to the memory of man. At one time in the history of English law this was fixed at the beginning of the reign of Richard I. Instead of an indefinite period, the courts in this country began to fix on a definite time of twenty years, in analogy to the statute of limitations concerning the entry into land. In many states this period is limited to fifteen years or twenty years. The use, to ripen into a prescriptive title, must be uninterrupted and having the actual or implied acquiescence of the owner under an adverse claim of the right, since no length of enjoyment by the land-owner's permission will ripen into an easement. The inference of a grant, if perfected at all, is derived from a claim of right on one side and yielding on the other. In one case two adjacent owners built a party wall between their estates,

resting it upon an arch, the respective legs of which stood on the lands of the different owners. The archway was used by them as a common passageway, and this was held by the court to be such an adverse user as to give to each a prescriptive right to have the wall thus supported. It is no objection to the acquisition of an easement in this manner that it began by permission, if the adverse claim is subsequently set up and maintained during the requisite period as a right.

Hundreds of cases have been tried involving the question, what kind of use is adverse. In one of them a person turned his cattle on land between which and a beach there was no fence. The cattle constantly wandered on the beach to look at the sea and to pick up crabs, and the farmer finally claimed that by thus wandering on the beach they had acquired a title thereto for him. The court decided otherwise. One test often applied is whether such a use is injurious to another or not. If it is not, it is said that it will not create a right by prescription. This test is not always correct. Again, permission to use the land of another negatives the idea of prescription, though, as we have said, a person may, in fact, after occupying land permissively, lay claim thereto as a matter of right. Again, it is said that the owner must know of such a user in order to render it effective. But acquiescence presupposes knowledge. Nevertheless, it is maintained that even a right of way cannot be acquired by prescription without the acquiescence, actual or implied, by the owner. But the presumption of acquiescence arising from actual knowledge may be rebutted by a proof of legal proceedings and denial of the right.

10. It should be added that, for a use to be "adverse," it must be against someone who is capable of acting. Consequently, a user will not begin to run against a minor, nor an insane person, nor against anyone while possessing a legal disability to act for himself in defending his possessions.[1]

11. Again, one in temporary possession of an estate as a tenant cannot by a user acquire in the land of another any easement that will continue any longer than his own estate. Thus, if a person, occupying under a lease of thirty years, should acquire an easement over the land of another by adverse user during the period fixed by law, the easement would come to an end on the cessation of his tenancy. In like manner a widow who might be enjoying her dower and also an easement connected therewith, would lose all right therein on the cessation of her dower estate.

12. In computing the time of enjoyment the user need not be by the same person during the entire period. Thus, if one who had enjoyed an easement, say for ten years, should die and his heirs should continue to use it for the remainder of the time required by law to complete his right, it would be gained.

13. In thus claiming an easement the prescription or use need not be exclusive. Other persons may, during the same period, have used or acquired the right. In other words, different persons may claim and acquire the same way or other right by different users.

[1] 2 Washburn, § 1255, p. 299. "But a disability arising after the use has become adverse, does not suspend the acquisition of the right or extend the time necessary to acquire it." Ibid.

14. So, too, they may be established by dedication, which is a method clearly distinguished from that above described. If the dedication be express there must be an appropriation of land by the owner to public use "by some express manifestation of his purpose to devote the land to the public use." If the dedication is implied, this results from "some act or course of conduct from which the law will imply such an intent."[1]

15. The law is strict in requiring the owner of an easement to confine himself to his express or implied grant.[2] A person who has a way for one purpose and makes use of it for another becomes a trespasser, as clearly as if he had no easement at all. A footway, therefore, cannot be used as a horseway, nor a carriage-way for driving cattle thereon. In one of the cases B's right to use a way for carrying off the farming produce of his land gave him no right to carry lime from his land over the same way. The law is perhaps still more strict in the case of grants that are implied. It compels people to restrict the use of the easement to such purposes as are reasonably connected with the use of the land granted.

16. The owner of the dominant estate is bound to repair the way; though the owner of the servient estate may, by contract or prescription, be required to make the necessary repairs. And when the owner of the servient estate is thus required to repair the way, the other owner may pass over other land of the servient

[1] Elliot on Roads, § 121, p. 133.

[2] See § 6. Washburn on Easements, § 9, p. 135. Says Kerr: "A right of way acquired by prescription for a special use or purpose cannot be used for another and different purpose." 3 Real Property, § 2216, p. 2219.

owner if he has not maintained the way in a proper manner. Such an additional use of the estate of the servient owner, however, is strictly limited by necessity.

17. As a right of way cannot be acquired by a mere parol agreement between the owners of the two estates, in like manner a right of way cannot be abandoned or surrendered orally. But an executed oral agreement to discontinue the use of a way has been regarded as sufficient evidence of a surrender.

18. What acts will operate as a surrender or abandonment must be determined in each case by itself, and this must be an act or acts done by the owner of the dominant estate, or with his consent, by the owner of the servient estate. Thus, one who had a right of way by a grant for a piece of land made an impassable fence across the same for seven years, and the easement was not extinguished. But the cases are not uniform on this subject. Many of them admit that a way may be abandoned by acts of a comparatively short duration. The test is the intention with which the acts are done.

19. Many of the rules we have given relating to the acquisition of ways apply also to easements of light and air. From their nature, the original acquisition of the right to their use must be in a different manner. Thus, an uninterrupted enjoyment of light and air over and across the land of another for twenty years or more is sufficient to acquire such enjoyment. Nevertheless, the enjoyment cannot be said to be adverse, for the very nature of light and air forbids or prevents such a user.

20. A person does not acquire a right to light and air across another's land for the benefit of his house by

simply erecting it on the border of his own land, while the adjoining land is unoccupied.[1] The reason is, by making windows in houses, the act is not an adverse use of another's property, for, in doing so, a person does not interfere in any way with the free enjoyment of the land by the adjacent land-owner. The adjoining owner may, therefore, at any time erect a house on his own land, thereby obstructing the light and air of another. Again, the owner of a house who has acquired the right of easement of light and air through a certain window, by closing it up and opening another of a different size and in a different place, loses his right altogether. In like manner, if he tears down an old house and builds a new one, his windows must be the same in size and position as those in the old house. It is said that the mere enlargement of a window would not destroy the easement if the other estate was not thereby more heavily burdened. Nor would a change in the uses of a room lighted by such a window make any difference.

21. In this country the rule is spreading that a prescriptive right to the enjoyment of light and air cannot be easily gained as an easement because it is incompatible with progressive changes, especially in the cities. But there is nothing to prevent the acquisition of light and air by an express grant or agreement.

22. The right to enjoy a prospect from one's estate as an easement cannot be acquired by any user, however long continued, nor will such a right, except a street view, pass by implication. Nor can a person maintain an action against another for erecting on his own land an

[1] This is the American rule.

obstruction to the former's view, unless the right has been acquired by express agreement.

23. The use of water may also be the subject of an easement.[1] The general rule is, any person through whose land a stream flows may use it. Therefore, a proprietor above cannot divert the stream or cut it off, or in any way seriously injure the rightful use of it by the owners below. But every person can make some use of the water while passing over or through his land, and, for the purpose of using it more effectively, can impound it for a reasonable period.[2] Many exceedingly important questions have grown out of the legal uses that may be made of it during its course. Thus, persons have a right to use the water for purposes of irrigation, or for watering their cattle, and yet there is clearly a limit to the use—even for these purposes—that anyone can make of it. If there were not a limit, perhaps a few, by making a too liberal use of the water, might exhaust the entire stream, leaving none for other riparian

[1] See next section.

[2] In a well-considered case that was recently decided, the court said, in reply to the objection that a riparian proprietor has no right to make a lake and divert the water: "He unquestionably has the right to make such use of the water as belongs to one who owns the land through which such a stream runs. The general rule is that each of the riparian proprietors is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes, and what is reasonable with respect to the rights of others must depend upon circumstances, such as the character and size of the stream and the use to which it can be applied. One of the common uses of a stream which is not navigable is to detain and obstruct its flow with dams, in order to utilise the water-power, and hence it cannot be said that building a lake in a stream is necessarily interfering with the rights of the others. Each case must largely depend upon its own peculiar facts, so far as the quantity that can be taken is concerned." West Arlington Improvement Co. v. Mount Hope Retreat, 91 Md., 191.

proprietors. To what use, therefore, is each individual limited? Such use as will not seriously affect the usual quantity. From this answer it will be seen that the question is an open one in each case. In some sections of our country this mode of obtaining moisture for lands is coming more and more into vogue; in these the question possesses the highest importance to the respective proprietors.

24. Should a riparian owner divert a stream, as indeed he may on his own land, it would be his duty to turn the stream into its former bed before debouching from his land.

25. Formerly, a riparian proprietor could not seriously injure the quality of the water. A mill-owner had no right to put dyestuffs or the refuse of his mill into the water to the injury of the other owners below who might wish to use it as a supply for watering their cattle, or for house purposes. This rule, like many others, has been greatly modified by the changed industrial and social conditions of more modern society, as we shall shortly explain.

26. In treating of surface water some difficult questions also have arisen. Two men own adjoining lands on a hillside, one above, the other below. Several suppositions may be made. First, if the upper proprietor desires to conserve or use all the water, can he do so? Again, instead of suffering it to drain off naturally, he makes artificial ways whereby it flows into or upon the land of his neighbour in one or a few places. Again, he is angry at the lower proprietor, and, knowing that he is desirous of obtaining as much of the surface water

as possible, spites him by digging a channel on the lower edge of his land through which the water runs into the street.

27. Let us look first at the lower proprietor. Can he prevent the natural flow of water by building an obstruction across the upper edge of his land whereby the water will accumulate until it finds an outlet in some other way than across his land? Or, to put the principle in another way, has the lower proprietor any right to prevent surface water from flowing off across his land by virtue of its gravity?

To two of these questions answers may be given. The upper owner has an absolute right to erect such obstructions as will prevent his land from injury by diverting the water into the highway, perhaps, or into some other place, although the use of it may be valuable to the adjoining owner below. Again, the lower proprietor has the same rights as the one above him to make such an embankment as will prevent the water from entering his land. This is not the law everywhere; in some states he cannot prevent such a natural course of the water as from a highway to a lower field.

There is a just distinction between subjecting the lower land to the ordinary usual servitude, the ordinary flow of surface water, and surface water unusual in quantity and impaired in quality. But is it just to subject the lower owner to an unusual flow caused artificially, or to water that is impure by reason of human action, without giving him compensation? Ought not the rule that applies to the defiling of a natural stream be applied in such cases?

28. A man may drain his swamp, though by so doing he may prevent the water which formerly collected there from finding its way into the stream, and thus diminish its volume. Likewise, the owner of a well, that is accustomed to overflow, may prevent such action, though in doing so he prevents it from draining into a ditch extending to a mill stream. But the owner of a spring that issues out of the ground, and flows in a natural channel into the land of another, cannot give a new direction to the stream, nor use the water on his own land to the other's injury. The character of surface water cannot be changed into a watercourse merely by collecting a considerable quantity.

29. A person may, by priority of use, acquire a right to the undisturbed enjoyment of water. Thus, should a person erect a mill and use the water for a period of twenty years in a certain manner, the other proprietors above and below him could not disturb his use of the stream in the future. But he cannot change the nature of his acquisition in any manner. If, for example, he had been in the habit of damming the water for a given length of time, this would not justify him in retaining the water for a longer period.

30. Though a watercourse cannot be diverted, except on the owner's own ground, this does not apply to water or springs running beneath. Consequently, in digging a well or tunnel, should the source or supply of another's well be struck and cut off, this would be a damage without redress. In one of the cases the court states the principle in this manner: "If a man digs a well in a his own field and thereby drains his neighbour's

well, he may do so unless he does it maliciously."[1] This principle, however, does not apply in places where the chief source of supply is percolating water obtained by artesian wells. In such places a land-owner has no right to sink wells on his land and draw off the water supply of his neighbours, whereby their trees, vines, and other plants perish.[2]

31. The right to cut ice is a natural right incident to riparian ownership. The riparian proprietor has the same right in the ice as in the water, for this is simply water in another form, and the limitation, therefore, is the same—that he must not cut enough to appreciably diminish the flow of the stream to the injury of the lower proprietors.[3]

32. Another easement is the natural right of the lateral support of land. The rule is that no person can use his land to the injury of another. Therefore, if he should excavate to the edge of his land, and his neighbour had a building adjoining the same, he could not continue this work to his neighbour's injury. Much litigation has grown out of the carelessness or ignorance of persons in not observing this principle. Everything turns on the manner of excavation. This must be done in a prudent manner, otherwise it is a wrong for which the excavator must respond in damages. In nearly every large city this matter is regulated by ordinance. Nevertheless, the owners of adjacent houses may acquire the right of a lateral support for a wall against

[1] Acton v. Blundell, 12 Mees & Wels., 336.

[2] Katz v. Walkinshaw, 141 Cal., 116.

[3] See next section, § 10, also Chap. I., § 4.

that of another; for example, the purchasers of several houses in a block, built, owned, and sold by a single owner. But neither of two persons owning adjoining houses has a right to the support of the other independently of agreement; nor does any length of time furnish evidence of one.

33. This easement must be distinguished from the right to use party walls, so called, by which we mean walls used for the common benefit of adjoining houses or buildings. But an owner who sets his house on the land of an adjacent owner, and erects a house thereon and inserts the beams into the wall as far as the line dividing the estates, does not thereby use a party wall as the term is here used. It is not necessary that a party wall should stand equally on adjoining lands. The rights of the parties may be determined by agreements or by user. In cities, especially, agreements are usually made defining the rights of the respective parties. A wall built at the joint expense of two parties, which stands one-half on the land of each owner, does not belong to them as tenants in common. Each owns his part in severalty, though each has a right to use the wall as an easement. If one carries up his part higher than the other, he does not become liable to the owner of the other half unless he is injured by the wall. Prescriptive rights may be acquired in the use of party walls, to which the same principles apply as in acquiring private ways.

34. The owner of land abutting a highway has no right to the lateral support of the soil of the street. Consequently, should the public authority lower the grade, and the owner's house in consequence fall, or the wall

be weakened, he would have no claim against the public.

35. A mine-owner has no right to excavate minerals in such a manner as will endanger the surface. The laws in many countries have provisions respecting the mode of timbering the mines and of leaving portions of the mineral as supports for the land above. In a coal mine, especially if the coal be of fine quality, the temptation is, to use a mining phrase, to "rob the pillars," thereby weakening the roof, and resulting not infrequently in terrible disaster. A sale of coal land with all the privileges pertaining to the working and using of the mines does not give the right to remove the surface supports, even if this be the usual mode of mining; for the usage is illegal. But the purchaser of land containing a release from all liability for any injury resulting from removing the surface supports, may remove them without liability. The right of support for the surface land is limited to the land itself and does not extend to buildings.

36. One may acquire also, as against his neighbour, a right to carry on an offensive trade on his own premises by exercising the right without objection for the period required to obtain a right by adverse user.

37. In like manner a right of fishery may be acquired by adverse user in the manner previously described. But no prescription runs against the owner of the waters, who is a minor, until he has attained his majority. Again, if such a use had begun in his father's lifetime it would be suspended, after his death, during his son's minority.

It is said that "no prescriptive right can be acquired

against a sovereign nation or state." This is true enough in its application to the United States,[1] but is too broad in its application to the states. A careful law writer has stated that the right of the public to lands dedicated to its use for streets, highways, and parks "cannot by one line of authorities be extinguished by any adverse possession, however long continued." By another line quite as long "the statute of limitations runs against municipal corporations the same as it does against private persons."[2]

38. An easement may be acquired in a division fence, whereby the owner on one side may require the other to make and maintain a portion, or all of it. Of course, the right would be extinguished through the purchase of both pieces by the same person. If, on the other hand the land should happen to be sold on one side to which the burden or benefit was attached, the purchaser would stand in the place of the previous owner, and be subject to the burden or enjoy the benefit, as the case might be.

39. An easement may be acquired in a wharf. One who erects a wharf below low-water mark, which is maintained for the required period, acquires a right to the use of it. His acquisition is limited only by the public right to free navigation, with which he cannot interfere.

40. In some cases an individual can acquire an easement in a landing place. This is determined by local

[1] Schneider v. Hutchinson. 55 Or., 253.

[2] 14 Am. State Rep., 278. See Orr v. O'Brien, 77 Iowa, 253, and Hoadley v. San Francisco, 50 Cal., 274.

usage. The same thing may be said of the right to take water from a spring or from a well, or to pass a given place or port free of toll.

41. A customary right to take things from another's land, such as gravel or sand for a building, cannot be acquired in favour of the residents in any particular unincorporated town or village. But an individual or a body politic and its successors may also acquire the right. For a body politic, like a town, to acquire the right, their acts must be of a strictly corporate character, because the acts of individuals are regarded as their own, and not representative, acts.

42. An easement may be lost or destroyed in various ways. It may be released by the owner of the dominant estate to the owner of the servient one. It may be lost by abandonment, but a mere non-user will not in any case thus operate. If the non-user be explained by showing that the way was not abandoned, but was less convenient than another which had been acquired, this fact will afford clear evidence of an intention not to abandon the other. A mere non-user for any time, not less than that required by law for establishing a right by prescription, will work an abandonment.

43. What are acts of abandonment? To preserve a dam, partly destroyed, in that condition, is an abandonment. Anyone above or below a mill-owner who tears down his mill with the intention of not occupying the privilege again, may employ the stream for a new mill. Intention largely enters into the determination of the question. Thus, one who had an ancient pond, afterward dug three others, and suffered the first to become

filled with rubbish. Subsequently, his title to the latter ponds having proved defective, he made use of the old one. This, the court held, he had a right to do.

§ 12. Individual Use of Waters

1. Right to natural flow of stream.
2. Regard must be had to the application of the principle.
3. What is a reasonable use?
4. Cities are entitled to same rights as individuals.
5. Owner's right in a non-navigable stream to exclusive fishery.
6. Rights of public in public water.
7. Rights of navigation.
8. Rights of public to raise and lower stream.
9. Employment of contiguous land for pleasure.
10. Taking ice from public water.

1. Every riparian owner has a general right to have the stream flowing by or through his land flow in its natural purity. This does not mean that there can be no pollution whatever. Every riparian owner can make reasonable use of a stream, but what is such a use of it is a question of fact—and of increasing difficulty.

2. Regard must be had for the occasion and manner of applying the principle; the kind of business; the importance and necessity of the use; and matters of that kind. In a very important case the court remarked that, among other things, may be considered the state of improvement of the country with respect to mills

and machinery and the use of water as a propelling power.[1]

3. A reasonable use of a stream may be different in one place from the use of a stream in another. This may be illustrated by a case that occurred some years ago in Wisconsin. The waters of a stream were rendered impure by a cattle-stable, so that the riparian proprietor below could no longer use them for domestic purposes. The court held that there might be such a special damage to the lower owner as would entitle him to a remedy against the upper proprietor. On the other hand, if the use of a stream in that manner by many of the proprietors along its borders was general, this might be a reasonable use of the stream. The question was put in another way. All the proprietors along a stream can make the most effective use of it. Is such a use for domestic, commercial or some other purpose? If, on the other hand, it was the principal source of water supply for the people living on its borders and for their cattle, this certainly would be the principal use of the stream, and would determine the character of the reasonableness of its use.

This view was maintained by the Supreme Court of

[1] The court, after declaring that each riparian owner's right to the flow of a stream through his land in its natural purity must be understood in a comparative sense, added: "But any use that materially fouls and adulterates the water, or the deposit or discharge therein of any filthy or noxious substance that so far affects the water as to impair its value for the ordinary purposes of life, will be deemed a violation of the rights of the lower riparian proprietor, and for such he will be entitled to redress. Anything that renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, will constitute a nuisance, and for the restraint of such a court of equity will interpose." Baltimore v. Warren Manufacturing Co., 59 Md., 96.

Pennsylvania concerning a stream that was used for carrying off the acidulated waters of a mine. A woman built a fish pond that was fed by the stream. At first the fish flourished; then they sickened and died. After their death followed the discovery that the waters of the pond had become impure by the action of the mine-owners. At the first trial the Supreme Court decided the mine-owners had no right to defile the stream which had been conveying pure water from the earliest days. Unwilling to abide by the decision the mine-owners desired a rehearing, which was granted. On the second trial the court had a larger comprehension of the question. It was then seen that the use of the stream as a sewer or receptacle of the waters of the mines was of much greater consequence than for a fish pond, or even for domestic purposes. The most important use of the stream, therefore, determined the mode of its use, and so the court, reversing itself, held that it was a proper thing for the mine-owners to discharge the waters of their mines in this manner. Necessity, therefore, had established the rule. The water must flow somewhere, and if the mine-owners were not permitted to relieve their mines of water, which, by natural gravity, must flow into the streams below, they would be obliged to suspend operations.

In like manner a salt-manufacturing company in New York destroyed, by their operations, the use of a stream for domestic purposes. Nevertheless, the court held that this was a reasonable use of the stream. But if a manufacturing plant, which thus pollutes the water of a stream, can continue business without

being seriously affected, then a different rule would apply.

4. Cities, as riparian owners, are entitled to the same use of a stream as other owners, and if such reasonable use results in polluting it, no liability follows. In a recent case in New York the court declared that the indispensable public necessity of cities and villages for drainage often rendered the use of such streams as sewers a reasonable one. The courts of Indiana have gone the entire length in holding that a city located on the banks of a stream may discharge its sewage therein, and that it is the necessary and only practical means of disposing of it. In New York the rule is not so sweeping, and the courts declare that this right is not absolute under all circumstances, irrespective of the size of the stream or the natural purpose which it subserves.

In a recent case in Massachusetts the court remarked that, when the population on the banks of a stream becomes dense, it naturally and necessarily suffers a still greater deterioration; roads and streets crossing it, or running by its side, with their gutters and sluices discharging into it their surplus water collected over large areas, are abundant sources of impurity against which the law affords no relief.[1] A city's use of a stream to carry away surface water is generally reasonable.

Cities, then, are governed by the same rule as individuals in using a stream, and if, as incidental to a reasonable use, the stream is to some extent polluted and rendered unfit for ordinary uses by lower riparian owners, they have no just cause for complaint. Furthermore,

[1] Merrifield v. Worcester, 110 Mass., 216, 220.

a reasonable use by a city of necessity causes a greater pollution than does a reasonable use by one individual. But, in an important case in New Jersey, it was held that the pollution of a river by the discharge of city sewage, gathered from a large area by means of an artificially constructed system, could not be justified as a natural and reasonable use of the river.[1]

5. The owner of land through which a non-navigable stream flows has an absolute exclusive right to fishing therein on his own land. This right must be so exercised as not to injure the rights of others on the stream above or below him.

6. The public have the right to use all bodies of public water. These rights include boating, fishing, and the use of the water or ice for ordinary purposes. In this regard a riparian owner has no exclusive or peculiar privilege.

As the rule is universal, that navigable streams are public, individuals having a right to use them as a highway, this right cannot be taken away or narrowed by any prescription on the part of individuals, though they may acquire some rights in this way as against other individuals.

7. Except salt-water streams, the question concerning the navigation of a stream is one of fact, and must be established by those who seek to use it. Furthermore, the stream must be navigated in its natural state, unaided by artificial means or devices.

8. The owner by a public body of water cannot prevent an injury to his land by the lowering or raising of the

[1] Simmons v. Paterson, 60 N. J., Eq., 385.

waters beyond the natural limits of high- or low-water marks by artificial means in the exercise of rights common to all, unless he has express authority to do so by law.

9. The employment of contiguous land for the purpose of pleasure, recreation, and health constitutes such a use of adjacent bodies of public water as to command a remedy for interference with its natural condition.

10. The taking of large quantities of ice from a body of public water, to ship to a distant market for sale, is not the exercise of the common right if this results in a special injury to a riparian owner. Consequently, he may enjoin the taker from cutting and removing the ice, and also sue in his own name for the damage he has incurred. This rule, though, does not prevail everywhere.[1]

The taking of water or ice from a body of public water by common right may result in destroying the source of supply, and no riparian owner or common user can complain; but when the use is made of such water for commercial purposes, not of common right, the right of using the water in the above manner ceases where the conflict of interest with the common use for commercial purposes begins. In other words, the use of the water for commercial purposes is deemed of the highest importance, and therefore determines its use whenever a conflict of uses arises.

Lastly, the taking of ice from a body of public water as a business and for sale, is not an ordinary use of the water by common right. It is an artificial use, which may be enjoined by a riparian owner who is thereby injured.

[1] See Chap. I., § 4.

CHAPTER V

THE USE OF HIGHWAYS

1. In driving each must keep to the right.
2. This rule is not always applied.
3. Especially when crossing or turning into a road.
4. A person driving on the wrong side assumes the consequences.
5. All who use a public street must exercise reasonable care.
6. Rights of travellers going in same direction.
7. Rights of walkers.
8. Rights of children and infirm persons.
9. Law of the road does not apply between footmen.
10. Duty of a person transporting articles that may frighten horses.
11. Duty of persons carrying dangerous tools.
12. Criminal liability for fast driving.
13. A traveller must keep his carriage and harness in good condition.
14. Liability for a runaway.
15. Liability is often determined by the proximate cause of the injury.
16. Liability when both are at fault.
17. A passenger is not responsible for negligence of driver.
18. Rule that applies to a servant.

19. Right to stop.
20. Right to drive animals through the street.
21. Use of new means of travelling.
22. Bicycle.

1. In describing the rules of the road the most general of all is that each party must keep to the right. This is directly contrary to the English rule. Where the rule is not prescribed by statute, courts will take judicial knowledge of the custom. And a statute providing that a traveller shall pass to the right of the centre of the road means the centre or travelled portion. When this is hidden by snow and a temporary path is made elsewhere, persons who meet therein should drive to the right of the centre as if it were a permanent way.

2. The above rule is not inflexible. Occasionally there are good reasons for not observing it. Thus, on some occasions a light vehicle should give way to a wagon heavily loaded; on others, the heavier wagon should stop and suffer the lighter vehicle to pass. Nor does the general rule apply to a building which is being moved through a street. If the movers are acting in accordance with law in thus obstructing the highway temporarily, persons who are passing to and fro must govern themselves accordingly.

Another limitation must be mentioned; the rule does not apply to driving in city streets.

3. The above rule does not apply to those who are crossing or turning into a road, nor to a driver who meets a walker. A person while driving across a road must not obstruct public travel unduly and prevent others from passing along the way.

Street railways are not exempt from the operation of this rule. They must not unnecessarily obstruct the crossings. Travellers in other vehicles need not refrain from using the track at proper times; provided they exercise due care, and do not impede the movement of the cars.

4. A person who drives on the wrong side of the way assumes the risk of his conduct. Furthermore, he must use greater care than if he kept on the other side. Should he collide with another the presumption would be against the person who was on the wrong side; nevertheless the other has no right to neglect all precautions. If the collision could have been prevented by his exercise of ordinary care, he cannot complain.

5. Persons who lawfully use a public street owe to each other the duty to exercise reasonable care, and every one is justified in assuming that every other person will act in the same manner.

6. What are the rights of travellers driving in the same direction? The leader is not bound to turn to either side if there be sufficient room for the others to pass. If there be not enough, Angell has said it is the duty of the foremost traveller, after a request has been made to him, to yield an equal share of the road to the requester, provided he can pass. If he cannot the passing must be deferred until the travellers reach a more favourable place. Elliott, the last and best authority on this subject, says it is perhaps doubtful if such a duty can be deemed absolute, and even if it should be so considered, the failure of the leading traveller to turn out to one side will not justify the other in purposely running into him or

attempting to pass at all hazards. The certain rule is a person who attempts to pass another going in the same direction must do so in the manner most convenient under the circumstances. If damage results in passing the passer-by must answer for the consequences, unless the other by his own carelessness brought disaster on himself.

7. Persons who walk on a highway have rights equal to those who drive or ride on horseback. Both classes are required to exercise prudence. A footman who undertakes to cross a street at a regular crossing has a just cause of complaint against a driver who recklessly drives into him. It is therefore the duty of both parties to move cautiously and carefully at crossings. A footman who attempted to cross a street in New York City in front of a rapidly moving vehicle was injured, yet failed to recover because the court declared he was negligent in attempting to cross the street at that place and time under the circumstances.

8. Children and infirm persons, as well as others, have a right to walk along or across the streets of a city. They have a right also to assume that carriages or horses will not be driven at an improper rate of speed. A driver, therefore, must take reasonable care not to injure such persons.

9. Again, persons often walk along the streets carrying tools and merchandise of a somewhat dangerous character. Not infrequently one is seen carrying a bundle of rods and, absorbed by the exciting scenes around him and forgetful of his dangerous bundle, pokes a rod into the eye of a passer-by. The poker is clearly answerable

for his negligence whenever he was not observing under all the surrounding conditions due care.

10. A person who is transporting over a highway articles of an unusual character which are likely to frighten horses, must employ persons to give warning to travellers and, if need be, assist them in travelling.

11. Again, travelling at a dangerous rate of speed on crowded streets is, in most cities, forbidden. To violate such an ordinance is negligence. It is said that where no ordinance exists a person is justified in travelling at a lively rate, even in the streets of a city. The rate of speed should be proportioned to the danger. Therefore reckless and noisy driving, whereby other horses are frightened and run away, is an actionable injury.

12. There may be a criminal as well as a civil liability for injuries caused by fast and reckless driving. Thus, two persons raced on a highway, and one of them ran over and killed a footman; both were declared guilty of manslaughter, on the principle that if two persons incite each other to do an unlawful act resulting in death to another, both are guilty.

To drive a mile in four minutes has been declared unlawful, and one who while driving at that rate collided with another driving at ordinary speed, and killed him, was declared guilty of murder in the second degree. Many cases of a similar nature have happened, resulting in similar punishment of the offenders.

13. A highway traveller must keep his carriage and harness in good, roadworthy condition; as the old English law expresses the idea, he must have a good tackle, and is negligent if he does not.

Occasionally a harness or wheel will break. This is not negligence in itself, for it may be a pure accident which could not have been prevented by using reasonable care. In other words, a traveller is not an insurer of his harness or vehicle. Thompson thus expresses the rule: If damages are inflicted by reason of the breaking of a carriage or tackle of a traveller on a highway, the traveller or owner of the tackle or vehicle is liable only on the principle of want of ordinary care.[1] Elliott says that this is unquestionably the true rule, for only those who enjoy unusual privileges or undertake unusual things are considered as warranters or insurers, and a traveller simply exercises a right free and common to all when he drives along a road or street.

14. The running away of a horse on a highway is not conclusive negligence on the part of the driver; but if no explanation is given, negligence may be presumed. Sometimes a horse gets loose and runs away. His flight may be the result of negligence in hitching him, but it is said that to leave a horse unhitched on a highway is not negligence in itself, especially if the animal is watched by a competent person.

To leave a horse loose in a city street is negligence, whether the animal is vicious or not. If a horse runs away through the owner's negligence he will be liable to anyone who is injured thereby, provided the latter was not guilty of any negligence on his own part. But injuries caused by a runaway horse will not make the owner liable unless he or his servant in some way were liable.

15. Not infrequently one's liability turns on the

[1] Thompson on Negligence, p. 381.

answer to the question, what was the proximate cause of the injury. Thus a team was left unhitched in the street, and in attempting to stop it, the runaway collided with another properly hitched. This caused the latter to run away and collide with a horse standing by the pavement and properly secured. The driver of the first team was liable to the owner of the horse against which the second team ran, as the injury was the natural, proximate result of the first driver's negligence.

16. Very often both drivers are at fault, and it is difficult to render exact justice between the offenders. Elliott[1] in his excellent work on the subject thus formulates the rule in cases of concurring negligence: "(1) If the plaintiff is without fault, and there is negligence on the part of the defendant and another independent person over whom the plaintiff has no control, both negligences partly directed causing the accident, the plaintiff may maintain an action for all the damages so caused him against either the defendant or the other wrong-doer. (2) If, in like case, the negligence is partly that of the defendant personally, and partly that of his servant, the plaintiff can maintain an action either against the defendant or his servant. (3) If the negligence is that of the defendant's servant, although the defendant may be free from personal negligence, the plaintiff can maintain an action against either. (4) If the negligence, although not of the defendant personally nor of his servant, consists of an act or omission of another, so done or omitted by the order, direction or authority of the defendant, the plaintiff can maintain an

[1] Roads and Streets, § 845, p. 921.

action either against the defendant or such third person. (5) Although the plaintiff, either in person or through his servant, has been guilty of negligence, if such negligence 'did not direct it partly caused the accident,' the plaintiff can maintain an action against the defendant who did cause it. (6) If the plaintiff is personally guilty of negligence which 'partly directly' caused the accident, he can maintain an action against anyone. (7) Notwithstanding the defendant or his servant may have been guilty of negligence, the plaintiff cannot, as a general rule, maintain an action, if, by the exercise of reasonable care, he or his servant could have avoided the accident."

17. The above rule applies to the drivers of vehicles or to the owners. In another chapter we have considered the rules that apply to servants,[1] but one other point remains for consideration. A person who is merely a passenger in a public or private conveyance, exercising no control, is not responsible for the conduct of the driver. But if he knew that the driver was drunk or otherwise incompetent, it would be his duty to take such action to prevent an accident as the circumstances might require.

18. The opposite rule applies to a master driven by a servant. The story has been often told of Lord Abinger, whose coachman on one occasion drove him along a street in London at a rapid rate. Abinger fearing that his servant would run into something and well knowing the rule of liability, shouted out to him, "Drive into something cheap."

[1] Book IV., Chap. V.

19. Travellers on foot or in carriage may stop a reasonable time by the wayside, but cannot interfere with the rights of others. On one occasion a traveller stopped, leaving his wife to watch the horse, which, becoming frightened by a Punch and Judy show, ran away. Nevertheless the owner of the other horse with which the runaway collided could not recover for the injury. A foot traveller may stop to tie his shoe or get a drink at a *fountain* without losing his right as a traveller.

This right must be used in a reasonable manner. In a city a coach or carriage cannot stop an unreasonable time to solicit passengers. A man cannot keep wagons constantly in front of his store in a manner seriously interfering with the use of the street by the travelling public. It is negligence to hitch a horse by the roadside in such a manner that the hind wheels of the carriage will extend into the beaten track.

20. Cattle may be driven, of course, along a highway, but this must be done in a reasonable and careful manner. There must be greater care in driving them through a city street than along a country road. Also in driving wild cattle, like those from the southwestern plains, than cattle more domesticated.

Should they escape while going along the highway and, through the driver's negligence injure someone or his property, the owner would be liable. On the other hand, if he were exercising proper care nothing could be recovered. Once a butcher bought an ox at a market and while the animal was going through the street it became excited, rushed into a china shop, and tried to hide among the crockery. Yet the hardly less excited

butcher was not responsible for the damage wrought by this unexpected detour of the animal.

21. Travellers are not confined to the uses of horses and ordinary carriages. How far they may avail themselves of new locomotion is an unsettled question. Elliott says that new and improved means must have been contemplated when the streets were laid out and fitted for public use. He thus states the rule: "When new means of locomotion come into general use among travellers on highways which is not dangerous when properly managed, and which does not seriously interfere with the proper use of the highway in other modes, we think it cannot be deemed unlawful in itself." The courts have gone so far as to hold that the use of a steam traction engine on a highway was not necessarily a nuisance.

In a recent case in Rhode Island the Supreme Court thus declared: "It cannot be doubted that the [owner of a machine has] a right to transport it over the highway. Any person has a right to transport over it elephants and animals which may frighten horses, also loads of goods which from their height or appearance or the noise made in transporting them may frighten some horses. But a person who drives along a highway an object or animal which from its appearance or noise is likely to frighten horses should take the precaution of having persons to warn travellers of the danger and thus prevent injury." This seems a reasonable rule, and anyone who disregards it ought to pay for the ill consequences of his conduct.

22. Finally, a word may be said concerning the use of bicycles. A few years ago they came into sudden use

and many injuries were caused before they became the subject of regulation. Many of the ordinary rules of negligence apply to the riders, and whether they have violated them or not is a question of fact to be ascertained by the jury as in other cases of negligence.[1]

[1] Whether a bicyclist who crossed a highway on his bicycle so near to a horse drawing a vehicle as to frighten him and cause a runaway, resulting in the death of one of the occupants of the vehicle, was guilty of negligence, was held to be a question of fact. Shortsleeve v. Stebbins, 77 N. Y. App. Div., 588.

CHAPTER VI

FARM LAW

1. What goes with purchase of land.
2. What goes with house.
3. What is included in mortgage deed.
4. Rights of proprietors adjoining a highway therein.
   a.—Shade trees.
   b.—Herbage.
   c.—Use of street for depositing building materials.
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   e.—Abutter's rights against others who use highway.
5. Condemnation of land by railroad companies.
6. Reasons for preferring to purchase.
7. Railroad fencing.
   a.—In many states company is required to fence.
   b.—Kind of fence required.
   c.—Gates.
   d.—Period within which fence must be built.
   e.—Liability for animals lawfully on track.
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   h.—Liability for frightening horses, etc., in running trains.

8. Liability of railroad company for fires.
   a.—Must use proper means to prevent fires.
   b.—Its duty to extinguish them.
   c.—Land-owners are not required to guard against fires.
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9. Fences between farms.
   a.—Triple object of them.
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   c.—Partition fences.
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   e.—What action may be taken against the one who refuses to build.
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   k.—Removal of partition fence.
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   a.—May be impounded.

b.—Impounding ordinances must be reasonable.
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11. Fence laws in South and Southwest.
a.—Reason for different rule.
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12. Feeding on land enclosed in common.
13. Liability of owner of cattle for damage done to third owner of land by unlawfully going through land of second owner.
14. Law relating to dogs.
a.—When an unregistered dog can be killed.
b.—When killing of registered dog is proper.
c.—Dogs may be killed that chase or attack sheep.
15. Remedy for stealing or killing a cat.
16. Contract of employment.

Besides the legal principles contained in the previous chapters relating to the ownership and use of land, other matters will be here added to complete this part of our work.

1. At the outset let us try to define more clearly what goes with the land at the time of purchasing. Of course, the fences are included, and also fencing material that may happen to be piled up on the land at the time of its sale. Standing trees are also included, those that have been blown or cut down, and are lying where they fell. But wood prepared for the market still belongs to the grantor of the conveyance.

Manure, also, whether lying in the barnyard or in a compact heap, passes with the farm.

2. There is greater difficulty in determining what passes to the purchaser with the house. A brick furnace goes with it, but the courts are not so unanimous in including portable furnaces. An ordinary stove with a pipe running into the chimney is excluded, while a range set in brickwork is not. Mantelpieces that cannot be removed without marring the plastering are included, while those resting on brackets can be taken away. The subject of gas fixtures has long puzzled the courts.

The Supreme Court of Pennsylvania more than sixty years ago decided that gas fixtures and chandeliers were personal property and did not pass by the sale of land to the purchaser. The court founded its rule on the older rule or usage. "There is really nothing to distinguish this new apparatus from the old lamps, candlesticks and chandeliers, which have always been considered as personal chattels. Gas stoves are largely used for bath and other rooms, and are necessarily connected with the gas pipes in the same way, but no one would think of saying that they were fixtures which it would be waste to remove. It is therefore more simple to consider all these gas fixtures, whether stoves, chandeliers, hall and entry lamps, drop lights or table lamps, as governed by the same rule as the article for which they were substituted."[1] And this rule has ever since been maintained in that and in other states. In Missouri the gas fixtures in a church did not pass by its sale by virtue of the same principle.

This rule does not prevail everywhere, and its weakness is clearly shown, we think, in the following utterances of

[1] Vaughen v. Haldeman, 33 Pa., 522.

an English judge. "The gaseliers are a part of the gas pipes, and, to use a legal expression, they take their nature, and are included in the fixtures, which go with the house under the lease. They are as much a part of the gas pipes as the mill stones are part of the mill. Although the gaseliers may be unscrewed and taken off without injuring the freehold, they are necessary to the enjoyment of the gas pipes which are of no practical use when separated from them."[1] This rule has been followed by a larger number of courts than the other; does it not rest on a sounder reason?

Pumps, sinks, water pipes, and all other fixtures attached to them for supplying water also pass with the deed, for they are as needful to enjoy the land as the land itself. To these rules may be added others stated by a careful writer: "If the farmer has iron kettles set in brickwork, near his barn, for cooking food for his stock, or other similar uses, the deed of his farm covers them also, as likewise a bell attached to his barn, to call his men to dinner. A cider mill goes with the apple orchard, and not with last year's crop of apples. If he has a cattle barn on the premises the tie-up planks, stanchion-timbers, tie-chains, and hinge hooks used for fastening the animals in their stalls belong to the barn, and not to the cattle. If the farmer indulges in ornamental statues, vases, etc., permanently erected, and resting on the ground by their own weight merely, and sells his estate without reservation, these things go with the land. But even this might not be so, if the article

[1] See 17 Am. Decisions, 686-696.

had just arrived and never been placed or fitted to its position on the lawn."

Other matters which have come within judicial inquiry and are held to pass with the land conveyed are the following:

A bar fastened by nails and screws to the wall and floor of a saloon, bookcases forming also the washboard around the floor; a hat rack built into the room; cisterns supplying the house with water, whether outside the house or in the cellar; cooking coppers, washtubs and water tubs, curbing enclosing a burial lot and a stone monument, a large hotel desk fastened to the floor; an electric annunciator attached to the wall, a hotel sign attached to a post on the sidewalk in front of a hotel; ice in an ice-house standing on sold premises; an organ in a church; partitions in a store; paintings on canvas cemented to the ceiling, platform scales resting on a permanent foundation; a tramway in a quarry.

The following things are not included in such a conveyance: Carpets and curtain rods; movable china-closets and movable screens; a cooking range fastened to the floor of a hotel; counters; meat racks; an ice-box used in a grocery and meat shop; a safe in a bank though bricked up; a weather vane with the owner's name attached to the roof of a house; marble slabs on brackets but not screwed to them; a playhouse built of boards picked up and nailed together by several children; including those of the vendor, stuffed birds attached to movable metal trays in cases fastened to the walls of a private museum.[1]

[1]These examples are taken from Vol. 13, American and English Encyclopedia of Law, 667, 668.

3. The same writer has added that in mortgage deeds there is one important difference "that any additions for permanent improvements upon the land after the mortgage is given, belong to the land, and go with it, so that if the farmer, after mortgaging his farm, erects a new barn, or other outbuildings, but fails to pay the mortgage debt, and the mortgagee forecloses, the owner will lose the whole, new and old, though it be twice the value of the whole mortgage debt."

4. Elsewhere we have described the rights of those who use a highway as a means of going from one place to another. But the adjoining proprietors have other rights that are peculiar and important. They have a right to the land itself subject only to the right of passage and repair by the public, and this right is often of no little worth. Such a proprietor may sink a drain below the surface, may carry water in pipes across or along the way, or mine minerals underneath. In perhaps the larger number of states the trees belong to him unless needed for repair of the way. A curious case is reported of a woman who, under the direction of the highway surveyor, cut the grass growing in a highway in order that her children might be able to go to school without wetting their feet. Thus far she was guilty of no wrong, but, after cutting the grass, she carried it away and gave it to her husband's horse, which ate thereof. The second act was a trespass, and still worse, it related back and included her entire conduct.

(*a*) In Maine an adjoining owner may plant shade or ornamental trees within the highway, provided

the public is not thereby impaired, and a highway surveyor who should destroy them would be a trespasser.

(*b*) Whether the adjoining owner is entitled to the herbage growing in the highway is a question not easily answered. In some states there are statutes empowering local boards to permit cattle to run at large on public highways. It would seem, says Elliott, that if the herbage belongs to the owner of the land "it cannot be taken from him either wholly or in part, without compensation," but the courts do not think alike on this question. One of them has declared that "the owner of the soil is not deprived of the pasturage any more than he is of the way. He can enjoy both in common with his neighbours." The Supreme Court of Connecticut maintains a different view, which is approved by the leading author on this subject. "The right on the part of the public to depasture the land is not necessary for the exercise of their right to pass over it, and the exercise of such a right on the part of the owner is not inconsistent with the public right; the land is not, therefore, sequestered for that purpose when it is laid out as a highway, and no damages are given to the owner for the loss of any such right. On a careful consideration of the subject we are fully satisfied that the granting or authorising such a license, no compensation having been in any manner provided for the owner of the land upon which it is to be exercised, is beyond the constitutional power of the legislature. It constitutes the taking of the property of one person for the use, either of another, or of the public. If of the former it cannot be done, either with or without

compensation; if of the latter it may be done, but only on providing compensation."[1]

(*c*) Another right belonging to abutters is the use of a street in front of their premises for depositing building materials, and for loading and unloading merchandise. This temporary use of a street is justified by necessity. The primary purpose of streets, so the highest court of New York has remarked, is for travel and transportation, and any interference with this use is deemed a public nuisance. But like so many rules this also has an exception. "An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods through the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers; and the use of a street for public travel may be temporarily interfered with in a variety of other ways without creation of what in the law is deemed a nuisance."[2]

Such a use by an abutter must be temporary and reasonable—a question of fact—a justifiable use by one proprietor may furnish no justification for a longer or larger use by another. An eminent English judge once remarked that an abutter "is not to eke out the inconvenience of his own premises by taking the public highway into his timber yard."

(*d*) Some other applications of this rule have been stated by Elliott that may be added. "No one has a right to appropriate a portion of a street to his exclusive

[1] Woodruff v. Neal, 28 Conn., 165.

[2] Roads and Streets, § 694. p. 848.

use in displaying his goods or carrying on his business, even though enough space be left for the passage of the public. Nor has a tradesman any right to so conduct his business as to collect a crowd of people in front of his store to such an extent as to interfere with public travel. And the owner of land over which a highway is laid out has no right to obstruct it merely because he has not been paid for the land; nor because he has opened a new road, although the latter may be as convenient for the public as the old way."

(*e*) Lastly, an abutter has all the ordinary remedies of a land-owner against one who makes any use of a highway outside or beyond the public use of it. Thus, he can maintain an action of trespass against anyone who unlawfully cuts and carries away his grass or trees, or who, standing on the sidewalk in front of his premises, abuses him and refuses to depart. An abutter may, by a proper action, compel a railroad company to remove its track which has been placed on the highway without paying him damages therefor. It has the same right to proceed against an individual who has unlawfully encroached thereon.

No man has a right to deposit his carts or merchandise in front of another's premises. Should the wrong-doer neglect to remove them after receiving notice to do so, the other can remove them to a suitable place. An owner of a drove of cattle who stops to feed in front of another's land is as responsible as if he turned them into the owner's field. Says another: "No person's children have a legal right to pick up apples under your trees, although the same stand wholly outside of the

fence. No private person has a right to cut or lop off the limb of your trees in order to move his barn or other buildings along the highway; and even if the owner of the building has a license from the proper authorities to move the same through the streets, this does not exempt him from liability to private sufferers. And no traveller can hitch his horse to your trees on the sidewalk, without being liable if it gnaws the bark or otherwise injures them, and you may untie the horse, and remove him to some safe place. If your well stands partly on your land, and partly outside the fence, no neighbour can use it, except by your permission. Nay, more; no one has a right to stand in front of your land and whittle or deface your fence, throw stones at your dog, or insult you with abusive language, without being liable to you for trespassing on your land; he has a right to pass and repass in an orderly and becoming manner—a right to use the road, but not to abuse it."[1]

5. Farms are often invaded by railway companies. Great civilisers, nevertheless their coming has often been very unwelcome, especially when coming too near the farmer's door, disturbing his animals by day and himself still more by night.

Railroad companies either purchase the right to use the land for making a track, or purchase the entire title, thus becoming absolute owners. Whenever they fail in their negotiations for the use or sale of it, then they can take as much as may be needed by virtue of authority granted by the state. No state would permit a railroad company to do this if it were not regarded in a

[1] Bennett's Farm Law, p. 32.

very real sense as a public corporation, obliged to transport passengers and merchandise at reasonable times and rates. Formerly, proceedings for taking land were more common than they are at present.

6. Companies now seek, as far as possible, to purchase the use, or the land outright, rather than resort to the legal methods of condemnation. One reason for adopting this course is, the juries who determine the value of the land taken generally have a strong regard for the farmer, and award high damages. Railroad companies therefore know from costly experience that to buy is cheaper than to condemn. Of course, in purchasing the parties may make any agreement they please, within legal limits, concerning the use of the land that is to be taken.

7. The fencing of the land acquired by a railroad company is an important matter and is often the subject of agreement.

(*a*) By statute the railroads in many states are required to maintain fences along their ways; in others no fences are required, but the companies are responsible for all injuries done to cattle through their ignorance of the hot and powerful nature of a locomotive. Doubtless a time will soon come when kindness to beast and economy in management will unite in erecting proper barriers against these invasions.[1]

(*b*) If no special kind of fence is prescribed by statute, any kind that is reasonably sufficient will suffice. The

[1] "As a railroad company may grant a right of way across its location, one may be granted over it by prescription in favour of an adjoining proprietor." Baldwin's American Railroad Law, p. 146.

usage of a locality is important. A barbed-wire fence may be sufficient, and has indeed come into general use. When thus used by the consent of law or usage a company will not be liable if cattle, frightened by the noise of a train, run into it and suffer injury.

If the company has specially agreed with an adjoining proprietor to maintain a sufficient fence, and through its failure to observe the agreement, an animal is killed, he can recover for the loss. Again, such an agreement or covenant runs with the land benefited and against the land charged, as respects subsequent grantees.

(*c*) "When there is a gate in a railroad fence," says Baldwin, "made and maintained for the use and convenience of an adjoining proprietor, the duty of keeping it closed rests on him, and may be enforced if need be by an injunction. If his cattle wander through and are killed, it is for him to show how it was left open, and if it appears that some stranger opened it, he cannot recover without showing that the company knew, or ought to have known, that it was open, and had time and opportunity to have it closed."[1]

(*d*) Again, the statutes sometimes specify the time within which fences must be built. If no statutes on the subject exist they must be built as soon as they are needed to give the required protection.

(*e*) Some questions still remain concerning animals that attempt the dangerous feat, either of walking the track, or walking along or across it, the latter experiment often proving just as difficult and fatal as the former. When they are lawfully on the track, as they may be, for

[1] American Railroad Law, Chap. XVII., § 4, p. 151.

example, at crossings or at other places where a fence cannot be possibly maintained, trains should be run with reasonable care to avoid collision with them. But the law is clear that this duty is inferior to that of saving the lives of passengers. Consequently, to lessen the danger to them, a train, when approaching a herd of cattle on the track, if it cannot be stopped before reaching them, may be rushed at still greater speed, though with the sure result of a greater loss of animal life.

(*f*) If an animal strays on the track by reason of the company's neglect in not building a fence required by contract or statute, even though due care was used in running the train, and is killed or injured, the company is liable. Whether the owner could recover if when turning his animal out to pasture he knew that the fence was defective or wanting, often depends on the statute regulating the matter.[1]

If a company has built a proper fence that has since become defective, the ordinary principles governing the relations of adjoining proprietors at common law apply. To turn cattle out into a pasture adjoining a railroad, immediately after a severe storm which has prostrated fences in many places, without first looking to see if the railroad fence was in good condition, might be inexcusable negligence.

A different rule applies to a non-adjoining proprietor. If his cattle stray into the land of an adjoining proprietor,

[1] In an action by A against B to recover for injury to A's livestock from a barbed-wire fence which separated their lands, A cannot recover if he turned his stock into a pasture adjoining the fence, knowing that it was in a dangerous condition and likely to inflict the injury. Ray v. Stuckey, 113 Wis., 77.

and through this upon the railroad, the owner has no cause of action against the company.

(*g*) If cattle without any right go upon a railroad track properly fenced the company performs its whole duty in using ordinary care, after they are seen, to avoid running them down. So much care the company must exercise, even though the owner was negligent in not looking after his cattle. Again, it is said that if the way is unfenced and none is by law required, "the train hands, in passing through territory much used for pasturage, should be on the lookout for cattle on the track; for it would there be natural to look for them occasionally to stray in that direction." In Alabama the highest court has declared that a railroad company which runs its trains in the night time at such a rapid rate of speed that it is impossible by the use of ordinary means to stop the train and prevent injury within the distance in which the cattle could be seen by the aid of a headlight is negligent.[1]

Cattle are rarely on a railroad lawfully except at a crossing. In approaching this a train must be run with ordinary care to prevent injury. A signal should also be given, as the attention of animals is attracted by noises. A failure to give signals by bell and whistle in many states is declared by statute to be negligence. This rule though does not apply to cattle that have strayed away from their owners and are on the track as trespassers. A mule that once forsook its owner and strayed on the track was killed. The owner tried to recover on the ground that the engineer neglected to

[1] Louisville & Nashville R. v. Kelton, 112 Ala., 523.

ring the bell and blow the whistle. But the court said that "if it was the duty of the engineer to blow the whistle as notice to the mule, I do not see why the mule should not be held to the rule, to 'stop, look, and listen.'"[1] The owner, therefore, was as helpless in law as his mule was before the engine that took his life.

(*h*) Lastly, to run trains under the most favourable conditions is risky, and animals are constantly frightened, especially by the whistle and by the general movement of the train. Horses are frightened by the passage of a train over or beneath them. The most frightful accidents occur in this manner, yet rarely can any damage be recovered of the company. It is simply doing what the law authorises. "If, however, such noises are unnecessarily and unexpectedly made, in such a way as to frighten horses lawfully on the railroad premises, their owner may be entitled to recover."[2]

8. Another subject hardly less important to farmers who live along a railroad is the question, who shall suffer for the loss caused by the sparks emitted by a locomotive? the railroad or the land-owner? A railroad is not liable for fires caused by locomotives unless there was something wrong in the mode of its construction or operation.

[1] Fisher v. Pennsylvania Co., 126 Pa., 293. "Where the principles of the common law obtain, a horse set loose to pasture on the road near a railroad crossing, which strays upon it, is, even in a state where the fee of the highway is owned by the adjoining proprietors, and they therefore have the right of pasturage upon it, unlawfully upon the railroad, and his owner is guilty of contributory negligence. If a runaway horse dashes on the track at a highway crossing ordinary care is due to avoid injury to him, and, for want of it, the owner can recover, if he used reasonable diligence to recapture the horse, and was not in fault for the original escape from his control." Baldwin, Chap. XVIII., § § 9, 10, p. 434.

[2] Baldwin, Chap. XLIII., 11, p. 434.

As a locomotive properly equipped and run does not ordinarily cause fire, if it is caused in that manner, both by statute and by common law, the fire is regarded as the result of the company's negligence. "It is almost necessary for the attainment of practical justice that such a presumption should be made. The condition of the locomotive and the mode of its operation will naturally be best known by the company, and probably known by it only." Of course, the company can overcome the presumption by clear and satisfactory evidence. To that end it may show that an engine, which is presumed to have caused the fire, was equipped with the proper fire screens and carefully operated by a competent engineer. On the other hand, the farmer may show the quality, size and character of the sparks thrown out from the locomotive, and may also "prove by expert testimony that such sparks would not be thrown out from a proper engine in proper repair."[1]

(*a*) The company is bound to use the best means, spark arresters or other contrivances in common use to prevent fires. Though not required to adopt the latest most effective invention, the company is chargeable with negligence if it does not procure those which have been thoroughly tested in practice and found the best. Statutes sometimes exist requiring the use of some particular safeguard, and if they appear to have intended to prescribe the only precaution to be taken, no other need be.

(*b*) Again, a company, though not negligent in starting a fire, may nevertheless be responsible for not putting it out. It is not "absolutely bound" to stop a freight or

[1]Baldwin, Chap. XLIV., § 2, p. 438.

passenger train for this purpose, but there are occasions when such action is needful. The courts have differed on this question. The Supreme Court of Missouri denies the responsibility of a railroad to act in the way of putting out or preventing the fire from spreading. Its reasoning is interesting, for it applies more widely than to a railroad company. "If a fire should originate on A's premises through no fault of his, and should extend to B's and consume his property, A, if not liable for the occurrence of the fire, would not be liable on the ground that carpenters whom he had employed in repairing a building on his premises or labouring men whom he had employed to dig a ditch through his farm had neglected to extinguish it. If not liable for the origin of the fire he cannot be held so on account of the neglect of a social duty by persons in his employment in a business not connected with the origin of the fire, or imposing any duty to extinguish it in addition to that which every citizen owes to society."[1] But other courts perceive that on such occasions railroad companies have a clear duty to perform that should not be lightly disregarded. "There is no hardship," says the Supreme Court of Texas,[2] "in requiring them not only to use a high degree of care to prevent the kindling of fires, but to extinguish them when they have their origin in the conduct of the company's business if this can be done by the exercise of ordinary care." The court further adds a principle of more general application:

"Every person has the right to kindle a fire on his own land and for any lawful purpose, and if he uses reasonable

[1] Kinney v. Hannibal & St. Joseph R., 70 Mo., 243, 257.

[2] Missouri Pacific R. v. Platzer, 73 Tex., 117, 122.

care to prevent its spreading and doing injury to the property of others no just cause of complaint can arise; yet although the time may be suitable and the manner prudent, if he is guilty of neglect in taking care of it and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done."[1]

(*c*) Land-owners along the line are not required to adopt special means to guard against fires that may be set by locomotives, nor to refrain from using their premises in the ways common among society. For example, they are not required to use metallic instead of shingle roofs, nor to maintain a fire apparatus.

(*d*) On the other hand, railroads may be negligent in not having a watch kept at a point of special danger; for example, at wooden bridges, which may easily be set on fire by a train and spread, thereby causing the destruction of other buildings. Again, if buildings thus exposed are erected by lease or license on land belonging to a railroad company, it may stipulate against loss caused by fire from any locomotive of the company.

(*e*) The company may be liable, not only for injury to land adjoining its own, but to other land perhaps far away, if the fire had a negligent origin, or if this character is given to it by statute. One who starts a conflagration

[1] "If track repairers cook a meal on the side of the tracks and a fire spreads therefrom to adjoining land, the company could not be held unless it knew of, or authorised such a use of its grounds, and the authority of the foreman of the section-gang would not be sufficient. For fires negligently set by independent contractors, in the construction or improvement of the railroad, the company is not liable, if the work was such as, even if properly done, would have resulted in a fire." Baldwin, Chap. XLIV., §§ 8, 9, p. 444.

is responsible for all its consequences. "If," says Justice Baldwin, "he starts it on a windy day, or in a windy season, when the fire is exposed to a wind blowing in a certain direction, he has some reason to anticipate that the flames or sparks may be carried that way. In such cases it is for the jury to determine whether the plaintiff's injury was the natural consequence of the defendant's act. The company may be liable for damages done many miles from the railroad."

(*f*) By statute railroads in many states are made liable for all fires set by their engines regardless of their non-negligence. Wherever this liability prevails they have an insurable interest in all property near their line. Its responsibility for losses is commensurate with its power to insure itself against them. On goods temporarily and transiently found along its line it may not be able to procure insurance. Such a statute, making a railroad company an insurer against fires set by its engines, does not give an action to owners of goods in its own hands, as a warehouseman, which are thus burned. Their rights we have considered elsewhere.

9. Leaving the questions that concern more especially farmers who live near railroads, resulting from their creation, we will consider some questions that concern farmers everywhere. One of these is the building and maintaining of fences.

(*a*) A fence serves a triple purpose—to mark a boundary, to restrain one's animals from going astray, to prevent the intrusion of animals belonging to others. While no one by the common law is obliged to maintain a fence for the latter purpose, he is required to keep his cattle either

by means of fences or by watching them from intruding on his neighbour. Says Blackstone: "Every man's land is, in the eye of the law, enclosed and set about from his neighbours; and that either by a visible and material fence, as one field is divided from another by a hedge, or by one ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field."[1]

If, therefore, one's cattle enter the land of another, the entry is a trespass, the owner is liable, nor will any degree of prudence excuse his act. This rule is so far modified that the owner of cattle which go astray while he is driving them along an unfenced highway is not liable if he regains them with reasonable promptness.

(*b*) A person has no right to drive his cattle over the land of another simply because it is not fenced. On the other hand, if animals enter the land of another, whether it is fenced or not, the latter, of course, may turn them back, but in doing so he can use only ordinary means, such as a prudent man would employ. He must not in his wrath inflict needless injury on them. And if he neglects this simple rule, whatever may have been the provocation, he cannot escape paying for his conduct. What a quietus would be wrought by the enforcement of an effective method of collecting a penalty in advance of the impending outburst!

(*c*) To prevent these things fences have been erected in the older and better settled parts of the United States, and the obligation to build and maintain them is often statutory, but the obligation may also be created by

[1] See § 10, describing a different rule in the South and Southwest.

agreement and prescription. The statutes, however, apply more especially to partition fences.

The building and maintenance of partition fences may be done by agreement between the respective owners, or by statute. But the requirement should not be overlooked that an agreement for building and maintaining such a fence is in many states, though not in all, within the statute of frauds, and therefore to be effective must be in writing.

The statutes providing for partition fences cannot be easily described, as they vary so greatly in the different states. Some of them, however, may be set forth possessing a general nature. They must be built upon the line between the adjoining owners, and, if more than half is built on the land of one without his consent, he may remove the excess, even though in so doing he removes the entire fence. Worm fences also come within this rule, the centre of the rails being regarded the dividing line between the adjoining lands.

The statutory division is made by fence viewers who act on the application of one or both parties.

In some states these officers constitute a permanent tribunal; in others they serve for only one occasion. The office is in its nature judicial. Says the Supreme Court of Iowa, in construing the statutes of that state on the subject: "Their jurisdiction is limited to matter involving the obligation of adjoining owners to erect and maintain partition fences; the assignment to each his share of the fence to be built and maintained; the prescribing of time within which it shall be built, and in case of failure to build, and the building by the other party,

the ascertaining and certifying of the value of the fence."[1] In other states the function of fence viewers is essentially similar.

(*d*) How long is the division thus made binding between the adjoining proprietors? As long as the lands continue to be co-terminous and no changes arise to disturb the equality of the division. When, therefore, there is a change in the ownership of a portion of the land, there may be a new partition.

(*e*) On default of one adjoining owner to build and maintain the portion of the fence assigned to him by the fence viewers, the other party may build the entire fence and receive the value of the portion of the party in default, such value to be determined by the fence viewers. In some of the states twice the amount of the cost of the portion thus built for the one refusing to build may be recovered. Furthermore, the fence viewers, when requested, may determine the sufficiency and value of the fence as a preliminary to recovering the amount of the delinquent.

(*f*) If fence viewers fail to comply with the statutes defining their authority their proceedings are void; otherwise they are final unless they have been guilty of fraud or have made a mistake. They cannot determine a fence to be partition fence which is not. They have no authority whatever to so establish division lines.

(*g*) Until there has been a division by agreement or by action of the fence viewers, no particular portion belongs to either owner. "Each party," says the Supreme Court of Massachusetts, "is equally bound to move in

[1] Peschongs v. Mueller, 50 Iowa, 237, 238.

the matter; and until such division there can be no deficiency or neglect alleged as to the fence of either party, separately and individually. If either, therefore, puts cattle on his own land and they enter upon the land of the adjacent proprietor, there being no partition of the fence separating the lots, he will be liable to an action of trespass therefor."[1]

(*h*) After the partition has been effected, the one who neglects to build his portion is liable for the injury done by his cattle on the land of his neighbour. On the other hand, the delinquent is without a remedy for the injury done by his neighbour's cattle that take advantage of the situation to invade his grounds. Says the court in a well-considered case: "After the fence has been divided the owner of a close can sustain no action for damages done by horses or cattle breaking into his close, through defect in the fence which he was bound to make and repair, if they were rightfully on the adjoining land."[2]

(*i*) What rule applies to cattle that are bailed or agisted? The answer is quite uniform: the bailee, because he has the legal custody and control of them. "He is the qualified or special owner. He stands in the place of the owner for the purpose specified, and the trespasses of the cattle are his trespasses."[3]

In another case the court said: "If a man were to hire his horse to another for a specified time, and deliver possession to the bailee, and the animal were within that time, and whilst in the bailee's possession, to commit a

[1] Thayer v. Arnold, 4 Met., 589.
[2] Laurence v. Combs, 37 N. H., 335.
[3] Rossell v. Cottom, 31 Pa., 528.

trespass, no one, we presume, would contend that the owner would be liable, for the reason that the owner would have no control of the animal."[1]

(*j*) An adjoining owner may erect a division fence as high and close as he pleases, nor can the opposite owner object to the use of the materials used, nor to the obstruction thereby caused to his view and light.[2] In a recent case the Supreme Court of Indiana thus remarked: "The fact that the division fence erected by A was close and high, and made of rough and unsightly materials, and that it cut off the view from B's lot, and shaded and thereby injured her garden, did not render the fence a private nuisance, nor entitle B to have A abated. A had the right to build a partition fence, a house, or any other structure on his premises, and along the entire length of the line dividing them from the real estate owned by B. The latter had no easement of light, air, or view in or over A's lot, and she had no legal cause for complaint if these were interfered with or entirely shut off by the erec-

[1]Ward v. Brown, 64 Ia., 310. Where horses trespassing on A were owned by several persons, not jointly, but severally, were kept together in a common herd on the owner's farm, and were under the joint control of all the owners, and they broke through B's portion of a division fence, which was out of repair, and damaged A's crops, A could maintain an action against all the owners jointly. Ozburn v. Adams, 70 Ill., 291.

[2]Abutting lot owners on city streets have a right to light and air which cannot be taken away from them under any conditions. "The abutting lot holder has the right to the light and air which the highway affords. To deprive him of this right would be to impair, or, it might be, to destroy, the comfort, enjoyment, or use to be deprived from the easement to which he is entitled." Townsend v. Epstein, 93 Md., 537. "Lot owners have a peculiar interest in the adjacent street, viz., easements of access, light, and air, which are property rights, and as such are as inviolable as the property in the lots themselves." 2 Dillon on Municipal Corporations, § 712 (4th Edition).

tion of a fence, house, or other building. A had the right to use his premises, and every part of them, for any lawful purpose which did not deprive the adjacent owner of any right of enjoyment of her property recognised and protected by law. The erection and maintenance of a division fence thereon was a lawful use of A's land and no legal right of B was violated or invaded thereby. A's motives in putting up and maintaining the division fence were unimportant. He had a legal right to construct and keep up the fence, and, having such right, his motives in asserting and exercising it did not impair or destroy the right."[1]

(*k*) Another point should be added concerning the removal of partition fences. Such a fence built wholly on one's land is his property and, unless the statute prescribes a different rule, the other cannot maintain trespass for its removal. Nevertheless he has a remedy for injuries arising from its removal if the owner was bound to maintain it for the other's benefit. But a different rule applies to a pasture fence built on the line between adjoining lands. This is the common property of both, and either may maintain an action for its removal or destruction by the other. On one occasion one of the owners of such a fence set back his half fourteen feet on his land, and the other sued him and recovered damages. The remover, so the court remarked, acted on his supposed ownership of the materials. This was a slender foundation for the right claimed—"to remove a structure dedicated to important uses, the subject of legal duty and

[1] Giller v. West, 162 Ind., 20, citing many cases. See Chap. III., Sec. 4, § 3.

legal protection, a barrier erected as a landmark of boundary, a partition of property, and a means of preserving the fence of society."[1]

10. When the animals of a neighbour are in one's land he may pursue one of three courses with respect to them. He may impound them, or sue the owner for damages, or turn them into the highway and thus give them another chance to return into his own land, or into the land of another. The last is the easiest method, leaving one's feelings out of account, the first is perhaps more effective.

(*a*) The right to retain animals running at large in the highways and other public places is regulated largely by statute. But the right extends further, to the impounding of animals trespassing on one's premises. It is said that "the mere trespass of animals will not justify their seizure and detention. Moreover, the strict construction put upon the right of distress requires that the taking must be before the trespassing animals leave the premises."

By the common law the detainer has no right to confiscate the animals thus taken, but authorises him to hold them until he is compensated for the damage he has sustained. The statutes now in perhaps every state determine what shall be done. In a general way the detainer has a right to keep the animals impounded until his damages have been paid, which are to be assessed usually by three or more disinterested land-owners. If the amount is not properly paid the law usually provides for the sale of the animals after due notice to the owner.

(*b*) The power of towns and other public bodies to

[1] Stoner v. Hunsicker, 47 Pa., 514.

enact ordinances providing for the taking up and impounding of animals running at large is unquestioned, as such ordinances partake of a penal character. The ordinances must be reasonable and be strictly construed in favour of the owner of property thus taken. In one of the latter cases the court said: "To seize and sell, upon necessarily short notice, animals of great value, because permitted by the owner to run at large in the streets, without an adjudication of the offense in the courts, seems to be a harsh remedy. But how this summary mode of proceeding can be avoided without surrendering the whole police power to protect the public highways from such an encroachment which destroys their use by the public for the time being, we fail to perceive. The owner will not restrain his own animals from running upon the streets. The city authorities must do so, and at once. Then such animals must be fed, cared for and kept until the owner pays the expense and takes them away. If he fails or refuses to do so they must be sold."

(*c*) Notice of the sale of the impounded animals by public authority is needful. An ordinance providing for their sale without this would be unconstitutional. The notice need not be personal; it is sufficient if posted or published in such a way that it will probably reach the interested party.

(*d*) Lastly, a non-resident is not exempt from the operation of an impounding ordinance, because it relates rather to property than to persons. If it is related strictly to the latter it would be inoperative, because an ordinance cannot have any force beyond the limits of the issuing power.

11. As we have seen, every man is obliged to confine

his cattle to his own land, and if he neglects his duty he is liable for any trespass they commit on the land of another. But in the South and Far West the opposite rule prevails: cattle must be fenced out, and a stock owner is not liable because he permits his cattle to range over unenclosed land not belonging to himself. In permitting them to thus range at will he is not guilty of negligence. Such land is in a sense regarded as a common, or "range." Nor is its state of cultivation important.

(*a*) The reason for this radical change in the rule has been given by Justice Brown in expounding the fence law of Texas. "There are, or were, in the state of Texas, as well as in the newer states of the West generally, vast areas of land over which, so long as the Government owned them, cattle had been permitted to roam at will for pasturage. It was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle accidentally straying upon the land of others. It could never have been intended, however, to authorise cattle owners deliberately to take possession of such lands, and depasture their cattle upon them without making compensation, particularly if this were done against the will of the owners, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words, the trespass authorised, or rather condoned, was an accidental trespass caused by straying cattle."[1] Therefore a cattle owner may turn his

[1] Lazarus v. Phelps, 152 U. S., 81.

animals to wander of their own accord, nor is he required to restrain them from grazing on lands which he knows belongs to another. But he has no authority to drive and keep them there.

(*b*) The wilful herding of cattle on the unenclosed land of another without the consent and against his protest is another question and requires a different answer. As the court said on one occasion, while the owner of cattle may not be liable for their going on the land of another, it does not follow that because such browsing is excusable as a trespass, it is a matter of right. "It is an immunity, not a privilege, or at most a license revocable at the will of the tenant, who may turn his neighbour's cattle away from his grounds at pleasure." To drive cattle, therefore, on the land of another wilfully for the purpose of confining them there is therefore just as unlawful in Texas as in New York.

Again, in thus feeding one's cattle on the land of another no title is thereby gained to the land itself as against the true owner. "He will not be permitted thus to ignore the truth that everyone is entitled to the exclusive enjoyment of his own property."

12. When the lands of several proprietors are enclosed in common, but used separately, though without division fences, the common law, just mentioned, still prevails, unless changed by statute. In such a case each owner must keep his cattle within his own enclosure.

13. Lastly, a land-owner is required to fence only against cattle which are lawfully at large and on adjoining ground; consequently if cattle which are ***unlawfully there*** go upon other land they are trespassers, and the lack

of a fence around the second enclosure is no defence against their wanderings.

14. Before concluding our observations concerning animals, the dog claims peculiar attention. The judicial mind has been puzzled in determining whether to classify him as property, or as a base kind of property. This much is certain: the ancient assertion that it is not larceny to steal a dog since he is not property, while it is larceny to steal a dead dog's hide, is no longer true; the world makes progress, even in establishing dog law. One writer has declared that "a dog is property in the fullest sense of the term." Says another: "The craven who would wantonly injure him is the subject of a fine. The thief who would steal him may be declared a felon and rendered infamous in the eyes of the law and his fellow citizens. Human life may be taken justifiably in the defense of his possession; and he is made the subject of the taxable burdens of the Government. He has been the friend, companion and solace of man; and the law only recognises the testimony of human nature, history and poetry in withdrawing him from outlawry." Yet the dog with all his fine qualities has some very bad ones, and strangers more often meet a dog, especially a large one, with more dread than pleasure. Consequently the public right to regulate the keeping of dogs is unquestioned. Very generally their owners, in order to keep them, must obtain a license, for which a tax is paid; he must put a collar around his dog's neck, and during a part of the year perhaps must muzzle him. If the legal requirements are not heeded dogs in many states, though not in all, may be killed without notice to their owners.

(*a*) To kill an unregistered dog is an extreme act, but the justification rests on the belief, which must be well founded, that a dog is a dangerous animal. "So far as a dog is a nuisance or a menace to society, he may be summarily killed at the common law, and for this matter, any other domestic animal may be." A writer, after maintaining that a dog was property, thus continues: "The destruction of any form of property without notice or hearing may in certain emergencies be justified, but the emergency must be extreme that authorises the destruction of property without due process of law. And due process of law has the same application to property in dogs that it has to property in other animals. An ordinance or statute authorising the killing of a dog forthwith, or without an opportunity for a hearing on the part of its owner, simply because he is not licensed or registered, or is without a badge or collar, permits the taking of property without due process of law, and can find no justification in law or morals. That they may be impounded, and after a reasonable time destroyed if not redeemed by their owners, after a reasonable opportunity to do so, we have no doubt. There is no public necessity for their destruction in a more summary fashion."[1]

(*b*) Even the lives of registered dogs are by no means secure. All depends on their good behaviour. Hence arises the very important question, what act or conduct on the part of a dog justifies an individual in killing him? On one occasion A saw a dog in front of his home, and discovered that he had left some tracks on his freshly painted porch. Wrathy, he procured his gun and shot

[1] 90 Am. St. Rep., 215.

the offender. The owner of the dog having sued A for damages, his wife testified that she found him one night in the henhouse, and the next morning she made the sad discovery of a broken egg. The remainder of the justification was that the dog came around A's house at night, chased the cats into the trees and barked. Thus, the dog not only annoyed A and his wife, but the cats still more. A though never informed the dog's master of these things. The court declared that "the law does not justify one in killing his neighbour's valuable dog under these circumstances. It might as well be contended that it is justifiable for one to shoot a neighbour's horse because he is in the habit of breaking into his enclosure, or making a noise around the house at night."[1]

(*c*) As dogs have a peculiar propensity for killing sheep, by statute in many states their owner is fully justified in killing any dog that attacks or chases them. The more general rule justifying such action has been thus stated by the Supreme Court of North Carolina. "The law authorises the act of killing a dog found on a man's premises in the act of attempting to destroy his sheep, calves, conies in a warren, deer in a park or other reclaimed animals used for human food and unable to defend themselves. The law is different where the dog is chasing wild animals, such as hares or deer in a wild state, or combating with another dog. In these cases a necessity for the act of killing must be made out, or the killing will not be justified."

[1]Bowers v. Horen, 93 Mich., 420. The vicious character of a dog may be shown by its repute in the locality where it is kept. Fisher v. Weinholger, 91 Minn., 22.

One of the best statements of the law on the subject is by Justice Butler.[1] "Whether before mischievous or not, or whether, if so, the owner has knowledge of his disposition or not, if actually found doing mischief or attempting to do it alone, out of the possession of his

[1] Woolf v. Chalker, 31 Conn., 129. The following points stated and explained in this case contain an excellent summary of the law on this subject:

Although the common law recognises property in the dog, it has always been esteemed a *base* property, and entitled to less consideration, and protection than property in other domestic animals.

Any person may kill a *mad* dog, or one that is justly *suspected* of being mad, or that is known to have been bitten by a dog which was mad.

If a dog becomes mischievous, and inclined to injure *property*, his owner is bound to restrain him *on the first notice;* and is liable for any injury he may thereafter commit to property of *any kind.*

Although a dog, by entering alone on the land of another and doing mischief, can not subject his owner to an action of trespass, as cattle and other animals which are inclined to rove and prey upon crops may do, yet, if the owner trespass, and his dog attend him and do mischief unbidden, that action will lie for the injury.

Whether before mischievous or not, or his owner know it or not, if found *at large,* doing or attempting to do *mischief,* or it is absolutely necessary for the preservation of property, he may be killed.

A dog which haunts the premises of another, and by barking and howling becomes a nuisance, if he cannot otherwise be prevented, may be killed.

A *ferocious* dog, accustomed to bite mankind, is a *common nuisance,* and if found at large may be destroyed by anyone.

The *keeping* of such a dog is *wrongful,* and, prima facie, the owner is liable to any person injured, and the plaintiff may recover without averring *negligence* in *securing* or *taking care* of him; nor is negligence of the plaintiff a defense.

The owner of such a dog is liable if he bite a person in consequence of being *accidentally* trodden upon, or because *irritated* by a *child,* or if he attack or injure a *trespasser.*

Such a dog is a *dangerous instrument* for protection, and keeping him for that purpose can only be justified in cases where the keeping of concealed instruments may be justified to prevent a felony. Nor can such use of him by the owner under his personal direction be justified, where a like degree of injury may not be inflicted lawfully by a different instrument.

owner as the charge of a keeper, he may be killed and the act justified at common law. And so he may be destroyed under any circumstances where it is absolutely necessary for the preservation of property. Other animals may become vicious and injure persons or property, and the injured person may have his action, but may not kill them. The discrimination against dogs results legitimately from their proneness to mischief, their uselessness and liability to hydrophobia, and the consequent base character of the property in them, and the necessity for that protection."

15. In this review of dog law, the dog's delight, pussy should not be omitted. Blackstone says that "among our elder ancestors, the ancient Britons, another species of reclaimed animals, viz., cats, were looked upon as creatures of intrinsic value, and the killing or stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the King's household, for which there was a very peculiar forfeiture."[1] A cat, like a dog, is a base kind of property, of doubtful value, and for that reason cannot be stolen. Anyhow, this was the decision reached with respect to a Baltimorean cat. The animal belonged to Mrs. A and was found in B's house, who refused to surrender his lively possession. B was accordingly arrested on a charge of larceny and kept in custody for a couple of days before the idea dawned on the minds of those who had taken part in

[1] "If anyone shall steal or kill a cat being the guardian of the King's granary, let the cat be hung up by the tip of its tail with its head touching the floor, and let grains of wheat be poured upon it until the extremity of its tail be covered with the wheat." The quantity of wheat required for covering up the animal was the measure of forfeiture. See note to Ingham's Law of Animals, p. 33.

arresting him that cat stealing was perhaps not a criminal offense. Four wise lawyers were consulted—two opined one way, two the other. The Attorney-General of the state then dispelled the darkness that a cat was not property in the legal sense that it could not be stolen. The prisoner was at once released, but this was not the end, for he sued his prosecutors for false imprisonment.[1]

If a person cannot be prosecuted for stealing a cat he may be compelled to pay damages for killing it, even though it be only a base kind of property—that is, unfit for food—although during the Franco-German War large numbers were eaten. Chitty, an eminent English law writer, has written that "trespass lies for taking any animal or bird out of the actual possession of a person who has secured the same; but no action lies for enticing from the premises of the owner and afterward killing or injuring a cat, which is not considered of any value in the law." Poor pussy! If Chitty is correct thou art an outlaw, but what says a Canadian tribunal? "I have no hesitation," says Judge Lonsdale,[2] "in giving it as my opinion that a person may have a property in a cat, and, therefore, that an action will lie to recover damages for killing it. There may be circumstances under which it would be justifiable to kill a cat, but it is not justifiable to do so merely because it is a trespasser, even though after game."[3]

[1] 40 Central Law Journal, p. 41.

[2] Whittingham v. Iderson, 8 Upper Canada Law Journal, 14. I have come across this case in Mr. Ingham's excellent work on the Law of Animals.

[3] A friend told the writer that he paid forty francs ($8) for one, nor did the price distress him so much as the fear he could not obtain another for any price.

16. Another topic of every-day importance is the legal nature of the different kinds of contracts for employment. This has been fully considered in the last part of our work, and nothing therefore need be added here.

FORMS OF LEASE

Short Form

This agreement, made the ..... day of ....., in the year of 19...., between ....., of the first part, and ....., of the second part, witnesseth:

That the said part.... of the first part ha.... agreed to let, and hereby do.... let to the said part.... of the second part, and the said part.... of the second part ha.... agreed to take, and hereby do.... take from the said part.... of the first part, ..., for the term of....., to commence on the ..... day of....., 19...., and to end on the ..... day of ....., 19..... And the said part.... of the second part hereby covenant.. and agree.. to pay unto the said part....of the first part, the ..... rent, or sum of ....., payable ..... And to quit and surrender the premises, at the expiration of the said term, in as good state and condition as they were in at the commencement of the term, reasonable use and wear thereof, and damages by the elements expected.

And the said part.... of the second part further covenant.. that ..... will not assign this lease, nor let or underlet the whole or any part of the said premises, make any alteration therein without the written consent of of the said part.... of the first part, under the penalty of forfeiture and damages; and that ..... will not occupy or use the said premises, nor permit the same to be occupied or used for any business deemed extra hazardous on account of fire or otherwise, without the like consent under the like penalty. And the said part.... of the second part further covenant.. that ..... will permit the said part.... of the first part, or ..... agent, to show the premises to persons wishing to hire or purchase, and on and after the first day of February, next preceding the expiration of the term, will permit the usual notice of "to let," or "for sale," to be placed upon the walls or doors of said premises, and remain thereon without hindrance or molestation. And also, that if the said premises or any

part thereof, shall become vacant during the said term, the said part.... of the first part, or ..... representative, may re-enter the same, either by force or otherwise, without being liable to any prosecution therefor; and relet the said premises as the agent of the said part.... of the second part, and receive the rent thereof, applying the same first to the payment of such expenses as ..... may be put to in re-entering, and then to the payment of the rent due by these presents; and the balance (if any) to be paid over to the said part.... of the second part, who shall remain liable for any deficiency..... And the said part.... of the second part hereby further covenant.. that if any default be made in the payment of the said rent, or any part thereof, at the times above specified, or if default be made in the performance of any of the covenants or agreements herein contained, the said hiring, and the relation of landlord and tenant, at the option of the said part.... of the first part, shall wholly cease and determine; and the said part.... of the first part shall and may re-enter the said premises and remove all persons therefrom; and the said part.... of the second part hereby expressly waive.. the service of any notice in writing of intention to re-enter, as provided for by any law or statute.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in the presence of .....

.....

.....

Lease of a House

This indenture, made this .....day of ....., 19...., between A. B., of the one part, and C. D., of the other part, witnesseth:

That the said A. B., for and in consideration of the rent, covenants, and agreements hereafter in and by these presents mentioned, reserved, and contained on the part and behalf of the said C. D., his executors, administrators, and assigns, to be paid, observed, done, and performed, hath granted, demised, leased, and to farm let, and by these

presents doth grant, lease, and to farm let unto the said C. D., his executors, administrators, and assigns, all that brick house, messuage, or tenement, with all and singular its appurtenances, situate, standing, and being in a certain street or place, called, etc., together with all and singular its appurtenances whatsoever, to the said brick house, messuage, or tenement, and premises belonging, or in any wise appertaining, and therewith heretofore held, used, occupied, and enjoyed by F. G., late occupier thereof.

To have and to hold the said brick house, messuage, or tenement, and all and singular other the premises hereinbefore granted and demised, or mentioned, or intended to be, with the appurtenances, unto the said C. D., his executors, administrators, and assigns, from the first day of August next ensuing, the day of the date of these presents, for and during, and until the full end and term of five years from the thence next ensuing, and fully to be complete and ended; yielding and paying therefor, yearly, and every year, during the said term, unto the said A. B., his heirs or assigns, the yearly rent of $400 on the ..... day of ....., 19...., in every year; the first payment thereof to begin, and to be made, etc., next ensuing the date of these presents.

Provided, always, nevertheless, and it is the true intent and meaning of these presents, and of the said parties hereunto, that if it shall happen that the said yearly rent of ..... hereby reserved, or any part thereof, be behind and unpaid by the space of ..... next over or after any of the said days, whereon the same ought to be paid as aforesaid, that then, and from thenceforth it shall, and may be lawful to and for the said A. B., his, etc., into and upon the said demised premises, and every, or any part or parcel thereof, with their appurtenances, in the name of the whole to re-enter, and the same to have again, repossess, and enjoy, as in his or their first or former estate or estates; and him, the said C. D., his executors, administrators, and assigns, and all and every other, the occupier or occupiers of the said demised premises, from thence utterly to expel, remove, and put out; anything in these presents contained to the contrary thereof, in any wise notwithstanding.

And the said C. D., for himself, his executors, administrators, and assigns, doth covenant and grant to and with the said A. B., his heirs and assigns, by these presents, in manner following—that is to say: that he, the said C. D., his executors, administrators, and assigns, shall and will well and truly pay or cause to be paid unto the said A. B., his heirs or assigns, the said yearly rent above reserved, according to the true intent and meaning of these presents, clear of, and over and above all taxes and reprises whatsoever.

And that the said C. D., his executors and administrators, and assigns, shall, and will from time to time, and at all time hereafter, during the said term hereinbefore granted, at his and their own proper costs and charges, well and sufficiently keep in repair the said demised premises, with their, and every of their appurtenances, and also the glass, windows, pavements, privies, sinks, and gutters belonging to the same, in, by, and with all manner of needful and necessary reparations and amendments whatsoever, when, and as often as the same shall require (damages by fire only excepted), and the same premises with all and singular their appurtenances, being in and by all things so well and sufficiently repaired and kept (except as before excepted), at the end, expiration, or other sooner determination of the said term hereby granted, shall, and will quietly and peaceably leave and surrender, and yield up unto the said A. B., his, etc., in good and sufficient repair and condition (reasonable use and wearing thereof, and damage by fire as aforesaid, only excepted); that he, the said C. D., his executors, administrators, and assigns, shall, and will from time to time and at all times hereafter, during the said term hereby granted, pay and discharge all taxes, charges, and impositions which shall be taxed, charged, imposed, or assessed upon the said message, or tenement, or premises, or any part thereof.

In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

A. B. (L.S.)
C. D. (L.S.)

Lease of Furnished House or Apartment

This indenture, made the.....day of....., one thousand nine hundred and....., between A. B., of ....., party of the first part, and C. D., of..... ....., party of the second part, witnesseth:

That the said part.... of the first part ha..... letten, and by these presents do.... grant, demise, and to farm let, unto the said part.... of the second part (describe premises), with the appurtenances, together with the furniture in the said....., a list, or schedule, or inventory of which is in possession of each party and to which reference is hereby made, the said schedule or inventory, having been examined by said parties, approved and signed by them, for the term of....., from the ..... day of....., one thousand nine hundred and....., at the .....rent, or sum of....., to be paid in equal monthly (quarterly) payments, in advance, ... And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said part... to re-enter the said premises, and to remove all persons therefrom. And the said part.... of the second part hereby covenant.. to pay to the said part.... of the first part, the said yearly rent, as herein specified. And, also, to pay the regular annual rent or charge, which is or may be assessed or imposed according to law, upon the said premises, for the water, on or before the first day of August in each year during the term; and if not so paid, the same shall be added to the.....rent then due. And the said part.... of the second part further covenant.. that.....will not assign this lease, nor let or underlet the whole or any part of the said premises, nor make any alteration therein, without the written consent of the said part.... of the first part, under the penalty of forfeiture and damages, and that.....will not occupy or use the said premises, nor permit the same to be occupied or used, for any business deemed extra hazardous on account of fire or otherwise, without the like consent under the like penalty. And the said part.... of the second part further covenant.. that.....will permit the said part.... of the first part, or.....agent, to

the offender. The owner of the dog having sued A for damages, his wife testified that she found him one night in the henhouse, and the next morning she made the sad discovery of a broken egg. The remainder of the justification was that the dog came around A's house at night, chased the cats into the trees and barked. Thus, the dog not only annoyed A and his wife, but the cats still more. A though never informed the dog's master of these things. The court declared that "the law does not justify one in killing his neighbour's valuable dog under these circumstances. It might as well be contended that it is justifiable for one to shoot a neighbour's horse because he is in the habit of breaking into his enclosure, or making a noise around the house at night."[1]

(*c*) As dogs have a peculiar propensity for killing sheep, by statute in many states their owner is fully justified in killing any dog that attacks or chases them. The more general rule justifying such action has been thus stated by the Supreme Court of North Carolina. "The law authorises the act of killing a dog found on a man's premises in the act of attempting to destroy his sheep, calves, conies in a warren, deer in a park or other reclaimed animals used for human food and unable to defend themselves. The law is different where the dog is chasing wild animals, such as hares or deer in a wild state, or combating with another dog. In these cases a necessity for the act of killing must be made out, or the killing will not be justified."

[1]Bowers v. Horen, 93 Mich., 420. The vicious character of a dog may be shown by its repute in the locality where it is kept. Fisher v. Weinholger, 91 Minn., 22.

One of the best statements of the law on the subject is by Justice Butler.[1] "Whether before mischievous or not, or whether, if so, the owner has knowledge of his disposition or not, if actually found doing mischief or attempting to do it alone, out of the possession of his

[1]Woolf v. Chalker, 31 Conn., 129. The following points stated and explained in this case contain an excellent summary of the law on this subject:

Although the common law recognises property in the dog, it has always been esteemed a *base* property, and entitled to less consideration, and protection than property in other domestic animals.

Any person may kill a *mad* dog, or one that is justly *suspected* of being mad, or that is known to have been bitten by a dog which was mad.

If a dog becomes mischievous, and inclined to injure *property*, his owner is bound to restrain him *on the first notice;* and is liable for any injury he may thereafter commit to property of *any kind.*

Although a dog, by entering alone on the land of another and doing mischief, can not subject his owner to an action of trespass, as cattle and other animals which are inclined to rove and prey upon crops may do, yet, if the owner trespass, and his dog attend him and do mischief unbidden, that action will lie for the injury.

Whether before mischievous or not, or his owner know it or not, if found *at large,* doing or attempting to do *mischief,* or it is absolutely necessary for the preservation of property, he may be killed.

A dog which haunts the premises of another, and by barking and howling becomes a nuisance, if he cannot otherwise be prevented, may be killed.

A *ferocious* dog, accustomed to bite mankind, is a *common nuisance,* and if found at large may be destroyed by anyone.

The *keeping* of such a dog is *wrongful,* and, prima facie, the owner is liable to any person injured, and the plaintiff may recover without averring *negligence* in *securing* or *taking care* of him; nor is negligence of the plaintiff a defense.

The owner of such a dog is liable if he bite a person in consequence of being *accidentally* trodden upon, or because *irritated* by a *child,* or if he attack or injure a *trespasser.*

Such a dog is a *dangerous instrument* for protection, and keeping him for that purpose can only be justified in cases where the keeping of concealed instruments may be justified to prevent a felony. Nor can such use of him by the owner under his personal direction be justified, where a like degree of injury may not be inflicted lawfully by a different instrument.

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the....., part.. of the first part, and....., of the....., part.. of the second part, witnesseth:

That the part.. of the first part ha.. hereby let and rented to the part.. of the second part, and the part.. of the second part ha.. hereby hired and taken from the part.. of the first part, ...for the term of .....years, ...to commence the .....day of....., 19...., at the yearly rent of..... dollars, payable..... And the part.. of the second part hereby covenant.. to and with the part.. of the first part to make punctual payment of the rent.....in the manner aforesaid, and quit and surrender the premises at the expiration of said term, in as good state and condition as they are now in, reasonable use and wear thereof, and damages by the elements excepted, and further covenant.. that ..he.., the part.. of the second part, will not use or occupy said premises for any business or purpose deemed extra hazardous on account of fire.

And further covenant.. that ..he.., the part.. of the second part, will not assign this lease or underlet the said premises, or any part thereof, to any persons whomsoever, without first obtaining the written consent of said part.. of the first part, and in case of not complying with this covenant, the part.. of the second part agree.. to forfeit and pay to the part.. of the first part the sum of..... dollars, as and for liquidated damages which are hereby liquidated and fixed as damages and not as a penalty.

This lease is made and accepted on this express condition, that in case the part.. of the second part should assign this lease or underlet the said premises, or any part thereof, without the written consent of the part.. of the first part, that then the part.. of the first part, his heirs or assigns, in his option, shall have the power and the right of terminating and ending this lease immediately, and be entitled to the immediate possession of said premises, and to take summary proceedings against the part.. of the second part, or any person or persons in possession as tenant, having had due and legal notice to quit and surrender the premises, holding over their term.

It is further agreed between the parties, that in case said premises should be destroyed by fire before or during said term, that then this lease is to cease and determine; the rent.....to be paid up to that time.

In witness whereof, the parties have hereunto set their hands and seals the day and year first above written.

In presence of

....

.....

Farm Lease

This indenture, made the.....day of....., in the year of our Lord, 19...., between A. B., of the city of ....., party of the first part, and C. D., of the same place, party of the second part, witnesseth:

That the said party of the first part, in consideration of the rents, covenants, and agreements hereinafter mentioned, reserved, and contained on the part of the said party of the second part, his executors, administrators, and assigns, to be paid, kept, and performed, has demised and to farm let, unto the said party of the second part, his executors, administrators, and assigns, all (insert description), with the appurtenances, unto the said party of the second part, his executors, administrators, and assigns, from the .... day of ....., 19.., for the term of ten years then next ensuing, yielding and paying therefor, unto the said party of the first part, his heirs or assigns, yearly and every year during the said term hereby granted, the yearly rent or sum of $....., in equal half-yearly payments, to-wit: on the 1st days of October and April in each and every year; provided, that if the yearly rent above reserved, or any part thereof, shall be unpaid on any day of payment whereon the same ought to be paid as aforesaid; or if default shall be made in any of the covenants or agreements herein contained, on the part of the said party of the second part, his heirs or assigns, to re-enter upon the said premises, and the same to have again, as in their first and former estate.

And the said party of the second part does covenant and agree, with the said party of the first part, his heirs and

assigns, that he, the said party of the second part, his executors, administrators, or assigns, will yearly and every year during the said term, unto the said party of the first part, his heirs or assigns, the yearly rent above reserved, on the days and in manner limited and prescribed as aforesaid, for the payment thereof, without any deduction or delay. And that the said party of the second part, his executors, administrators, or assigns, will, at his own proper costs and charges, bear, pay, and discharge all taxes, duties, and assessments, as may, during the said term hereby granted, be charged assessed, or imposed upon the said demised premises. And that on the determination of the estate hereby granted, the said party of the second part, his executors, administrators, or assigns, shall and will leave and surrender unto the said party of the first part, his heirs or assigns, the said demised premises in as good state and condition as they are now in, ordinary wear and damages by the elements excepted.

And the said party of the first part does covenant and agree, with the said party of the second part, his executors, administrators, and assigns, that the said party of the second part, his executors, administrators, and assigns, paying the said yearly rent above reserved, and performing the covenants and agreements aforesaid on his part, the said party of the second part, his executors, administrators, and assigns, shall and may at all times during the said term hereby granted, peaceably have, hold, and enjoy the said demised premises, without any manner of trouble or hindrance of or from the said party of the first part, his heirs or assigns, or any other person or persons whomsoever.

In witness whereof, the parties to these presents have hereunto set their hands and seals.

Sealed and delivered in the presence of

.....

A. B. (L. S.)
C. D. (L. S.)

Agreement Concerning Party Wall

This agreement, made this.....day of....., 19...., by and between J. M. and W. C., of the city of

....., witnesseth: That, whereas, the said W. C. is the owner of the house and lot on the south side of ..... Street, second lot east of ..... Street, and the said J. M. is the owner of the lot adjoining the same next easterly thereof, on which said lot there now stands a party wall on a line parallel with ..... Street; and forty-four feet easterly from said ..... Street; and, whereas, the said J. M. has erected his dwelling-house several feet (one story higher than the said W. C., whereby greater advantage may accrue to the said J. M. from said party wall. Now, therefore, the said W. C., in consideration of the sum of $1, to him in hand paid, the receipt whereof is hereby acknowledged, doth grant, covenant, promise, and agree with the said J. M., that he may peacefully and lawfully enjoy such party wall, to himself, his heirs, and assigns, the said W. C. reserving to himself the right to use the said portion of the party wall built by the said J. M., whenever he may wish to build higher than his house now is.

It is further mutually understood and agreed, between the respective parties, that this agreement shall remain so long as the houses last, and shall pass to the heirs and assigns of the respective parties to these presents.

Witness our hands and seals, the day and year first above written.

J. M. (L. S.)
W. C. (L. S.)

Notice to Build or Repair Division Fence

To....., Esq.:

You are hereby notified and required, pursuant to section ....., of the Town Law, to build and maintain (or, repair) your portion of the division fence between your lands and the lands of the undersigned, beginning (state where fence is to be built or repaired) within one month after receiving this notice, in default of which I shall cause the same to be built (or, repaired) at your expense.

Dated, this.....day of....., 19...

.....

Certificate of Apportionment of Division Fence

County of.....
Town of..... } ss.:

Whereas, a dispute has arisen between..... and....., adjoining owners of land in said town, concerning the apportionment of the division fence between said lands; now, therefore, we, the undersigned fence viewers of said town, duly chosen to bear and determine the dispute, pursuant to section....., of the Town Law, after giving due notice to said owners of the time and place of this meeting, and having viewed the premises, heard the parties and the evidence produced, do hereby determine that the following is a correct description of the said division fence (describe it); that the said.....shall maintain and keep in repair all that portion of the fence (here describe it), and that ..... shall maintain and keep in repair all that portion of the fence (here describe it), and that each pay one-half (or, as the case may be) of the costs and expenses of this proceeding, which are $.....

Dated, this.....day of....., 19....

.....
.....
Fence viewers.

Notice to Owners of Strays

To....., Esq.:

You are hereby notified, pursuant to section 123 of the Town Law, that the undersigned, a resident of the town of....., in the county of....., has upon his enclosed lands (or, in pound, as the case may be), the following animals belonging to you (here describe them), and that the same are being held as strays (or, beasts doing damage, as the case may be).

Dated, this.....day of....., 19.....

.....